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THE PRIVY COUNCIL ON APPEALS
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AND

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JUDGES OF THE HIGH COURT.
1917.

Chief Justice :

The Hon'ble Sir Lancelot Sanderson, Kt., K.C.

Puisne Judge :

The Hon'ble Sir John George Woodroffe, Kt.
" Sir Asutosh Mookerjee, Kt., C.S.I.
" Sir Charles Chitty, Kt.
" E. E. Fletcher.
" Digambar Chatterjee, (*Retired on 1st March, 1917*).
" Nalini Ranjan Chatterjea.
" W. Teunon.
" T. W. Richardson.
" Sir Asutosh Chaudhuri, Kt.
" C. P. Beachcroft.
" H. Walmsley.
" W. E. Greaves.
" B. B. Newbould.
" Nawab Sir Syed Shamsul Huda, K.C.I.E.
" M. Smither, (*Offg.*).

Advocate General :

The Hon'ble Sir S. P. Sinha (*Offg.*).
Mr. B. C. Mitter (*Offg.*).

Standing Counsel :

The Hon'ble Mr. B. C. Mitter.
Mr. S. R. Das (*Offg.*).

Senior Government Pleader :

Babu Ram Charan Mitra, C.I.E.

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PRESENT : *Lord Atkinson, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.*

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v.

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June, 5, 6, 7. July 21.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, OUDH.]

Mahommedan Law—Succession—Custom—Ancestral and self-acquired properties—Oudh Estates Act (1 of 1869), Ss. 3, 8 and 10—Talukdari primogeniture—Presumption as to non-talukdari property arising from inclusion of estate in list 2—Burden of proof of custom—Wajib-ul-arz, evidenciary value of statements in.

Under the Mahommedan law all classes of property follow one side of devolution. That law makes no distinction between ancestral and self-acquired property, and recognises no principle of differentiation in the matter of lineal and collateral succession, as is the case under the Hindu law of Mitakshara. Under the Mahommedan law if a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the ancestral estate to establish it.

Where in Oudh a summary settlement of the Government revenue was made with one J. A. K. a Mahommedan on January 22, 1859, a Talukdari sanad was granted to him on October 17, 1861, and his name was entered as a talukdar in the first and the second of the lists prepared under Oudh Estates Act, but it was contended that as J. A. K. had died before the Act came in force it applied neither to him or his taluka :

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Held, that the lists which the Chief Commissioner was directed to "cause to be prepared" under section 8 of the Act were obviously in course of preparation long before the passing of the Act, and the limit of six months was clearly meant as a limit for their completion and not for their initiation; and that J. A. K. was a talukdar within the meaning of the Act and he had acquired, as declared by section 3 thereof "a permanent, heritable and transferable right" in his estate.

Held, also, that the inclusion of J. A. K.'s name in list 2 also was, by virtue of section 10, conclusive evidence of the fact that there was a pre-existing custom attaching to his estates on which their inclusion in that list was based; and that in the case of a Mahommedan talukdar the existence of the pre-existing custom gave rise to a presumption that the custom applied to non-talukdari property, and the person who alleges that there is a different course of succession in respect of the non-talukdari property must prove his allegation.

Achal v. *Udai Partab* (1), and *Thakur Ishri* v. *Baldeo* (2) explained.

Janki Pershad v. *Dwarka Pershad* (3), and *Maharajah Partab Narain* v. *Maharanee Subhao* (4) distinguished.

Parbati Kumari v. *Jagadis Chunder* (5) referred to.

A wajib-ul-arz is a village administration paper, prepared by a village official, in which are recorded the statements o persons possessing interest in the village relative to existing rights and customs; and as such they are of considerable value in the determination of such rights and customs; but statements which merely narrate traditions and purport to give the history of devolution in certain families not even of the narrators, stand in no better position than any other tradition.

Appeal from the Court of the Judicial Commissioner of Oudh, (August 4, 1913), reversing a decree of the Subordinate Judge of Sultanpur (April 25, 1913).

Raja Azam Ali Khan, whose taluka of Deogaon was included in list 2 mentioned in the Oudh Estates Act, died possessed of considerable other property also. He left two sons; the elder Mustafa, succeeded to the taluka by the rule laid down in section 22 of the Act, the younger was the appellant. On Mustafa's death leaving the respondent as his heir to the taluka, the appellant sued for a half-share of the non-talukdari property, which he claimed as co-heir with Mustafa under the ordinary Mahommedan law of inheritance.

(1) (1883) L. R. 11 I.A. 51; I. L. R. 10 Calc. 511.
(2) (1884) L. R. 11. I. A. 135; I. L. R. 10 Calc. 792.
(3) (1913) L. R. 40 I. A. 170; 18 C. L. J. 200; I. L. R. 35 All. 391.
(4) (1877) L. R. 4 I. A. 228; I. L. R. 3 Calc. 626.
(5) (1902) L. R. 29 I. A. 82; I. L. R. 29 Calc. 433.

The Subordinate Judge fixed an issue whether there existed a family custom relating to the acquired property at variance with the ordinary law; he placed the burden of proving this on the defendant (respondent) and holding that he had not discharged it, decreed the plaintiff's claim. The Judicial Commissioners of Oudh reversed this decision, holding that the onus was on the plaintiff to show that the non-talukdari property was subject to a different rule of devolution from the taluka; they dismissed the suit with costs. The appellant then brought the present appeal.

De Gruyther, *K. C.* and *Arthur Grey*, for the Appellant: A summary settlement of the taluka was made by Government with Jamshed Ali Khan, the predecessor in title of the parties, and on October 17, 1861, he was given a sanad providing that the estate should descend by the rule of primogeniture. For the effect of such sanads see *Devi Baksh Singh* v. *Chandrabhan Singh* (1). It is not suggested that the appellant had any claim to the villages comprised in the settlement and sanad: but his case is with regard to other property, outside the Act altogether. With regard to this, custom at variance with the ordinary law must be proved; failing such proof the property outside the Act will be partible: *Janki Pershad Singh* v. *Dwarka Pershad Singh* (2). The position there was the same as here, except that in the earlier case the new property was purchased out of the proceeds of the old. Section 8 of the Oudh Estates Act, was conclusive as to its impartibility.

(Mr. Ameer Ali: The Board held that in the absence of any proof that the persons who acquired the property intended to incorporate it within the estate, it was not included.)

These properties falling outside the Act, the ordinary law applies unless a custom is established. In *Janki* v. *Dwarka* (2) it was the Hindu law; here it is the Mahommedan law.

As to the evidence of custom which has been adduced in this case, the wajib-ul-arz papers prepared under Oudh Circular 20 of 1863 para. 3 (Oudh Rules, p. 26) do not establish any custom of impartibility: on the contrary the pedigree there given shows that there were partitions. The mere fact that on some occasions the eldest son alone was put forward as owner is not conclusive that the estate was impartible: it was the practice for the eldest son to represent the family as regards the Government: *Hyder Hossain* v. *Mahomed Hossain* (3).

(1) (1910) L. R. 37 I. A. 168; 12 C. L. J. 303; I. L. R. 32 All. 599.
(2) (1913) L. R. 40 I. A. 170; 18 C L. J. 200; I. L. R. 35 All. 391.
(3) (1872) 14 Moo. I. A. 400.

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Wajib-ul-arz is admissible in evidence under the Indian Evidence Act, section 35 to prove a family custom of inheritance stated therein: *Lekraj Kuar* v. *Mahpal Singh* (1).

The nature of the evidence required to establish a family custom varying the ordinary law is discussed in Mayne's Hindu Law (8th ed.), Art 50, where various cases are cited: vide also Field's Law of Evidence, 5th. Ed. p. 106. Evidence of reputation as to the existence of a family custom is admissible, but of little value. Hence we have no evidence of witnesses who depose at first hand to the alleged custom. Evidence of men as to tradition of impartibility at variance with actual instances of partition, cannot establish the custom. Custom arises from a series of instances, and this Board has held that to prove it you must prove a series of instances; stray members of the family may have acted on the alleged custom, but that custom has never had the opportunity to grow to maturity. Both Courts admit that there was no custom of impartibility at the time of Pabar Khan's death, when in fact a division took place. The burden of proving this alleged custom is on the respondent and it has not been discharged.

Dunne and *Dube*, for the Respondents: The inclusion of the taluk in list 2 is conclusive evidence of the custom as affecting the taluk. With that custom proved, it is very probable that the same rule applies to the other property. The Statute requires an inquiry as to the custom relating to the property included in the list: it is only after such an inquiry that the entry is made.

Janki Pershad Singh v. *Dwarka Pershad Singh* (2) was a Hindu case, and a case of self-acquired property in a joint undivided family. In Hindu law there are two totally different rules of succession as to self-acquired and ancestral property. Among Mahommadans there is no such distinction; all property goes normally in the same way.

(*Mr. Ameer Ali.* If you prove a custom in fact, that would cover all property the man died possessed of, but the Act does not go so far: it merely established the custom as regards the taluka)..

(*Lord Parker of Waddington*: A custom varies the common law of inheritance, where there is only one rule of descent; the existence of a custom *prima facie* applies to all kinds of property: but where there are two, the proof of a custom varying one is no evidence at all that the other is varied.)

There is a very marked distinction between list 2 and list 3. If the property were included simply because the then owner wished

(1) (1879) L. R. 7 I. A. 63; I. L. R. 5 Calc. 744.
(2) (1913) L. R. 40 I. A. 170; 18 C. L. J. 200; I. L. R. 35 All 391.

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it to be impartible, there was no reason why he should get it in list 2; he could get all he wanted under list 3, the inclusion in list 2 is that the estate is labelled as one which according to the custom of the family, descends to a single heir: *Narindar* v. *Achal* (1). The rule of descent under list 2 need not be primogeniture, it may be selection: *Thakur Ishri Singh* v. *Baldeo Singh* (2). The sanad granted by Government on Jamshed Ali Khan's application gives him what we may say was the family custom as the rule of devolution for the taluk. In 1868 when there was litigation a predecessor of the appellant admitted the custom of primogeniture.

The custom is proved (1) by the act, (2) by the admission of appellant's predecessor and, (3) by tradition through a number of witnesses. Such evidence is not to be disregarded, even though instances confirming it cannot be cited: *Mohesh* v. *Satrughan* (3).

As to the conclusiveness of entries in list 2 vide *Mohammed Abdussamad* v. *Kurban Husain* (4).

De Gruyther K. C. in reply: No custom has been established irrespective of the Act. The entry in list 2 or list 3 is conclusive only for the purposes of the Act and for succession to an "estate" under the Act, but not a word of the Act applies to any property which was not an estate at the time the Act was passed. It has never been held that the Act applies to such property merely because the owner was a talukdar to whose taluk the Act applied.

The Oudh Estate Act, applies only to "estate" as defined therein: *Mohammad Abdussamad* v. *Kurban Husain* (4), and *Bhasba Rabidat Singh* v. *Indar Kunwar* (5) referred to. This is only one rule of succession in Hindu Law. Given and proved a custom, the whole property cannot pass by it, *i. e.*, the burden of proof is on those who deny it: *Jagdish Bahadur* v. *Sheo Partab Singh* (6) referred to.

In regard to property to which the Act does not apply, no presumption of custom can be raised from the Act: *Janki*

(1) (1893) L. R. 20 I. A. 77 (78); I. L. R. 20 Calc. 649.
(2) (1884) L. R. 11 I. A. 135; I. L. R. 10 Calc. 792.
(3) (1902) L. R. 29 I. A. 62 (68); I. L. R. 29 Calc. 343.
(4) (1903) L. R. 31 I. A. 30 (36); I. L. R. 26 All. 119.
(5) (1888) I. L. R. 16 Calc. 556.
(6) (1901) L. R. 28 I. A. 100 (110); I. L. R. 23 All. 369.

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v. *Dwarka* (1) is conclusive, unless it was wrongly decided. Once you have property to which the Act does not apply, you can not have a retrospective custom: the ordinary law prevails unless a special custom is proved: and such special custom must be proved, not of mere presumption, but of facts by the person who relies on it.

Their Lordships' judgment was delivered by

July, 21.

Mr. Ameer Ali:—The facts of this case are fully set in the judgments of the Judicial Commissioners of Oudh, from whose decree dismissing the plaintiff's claim this appeal is preferred; their Lordships are thus relieved of the necessity of referring to them at any length.

The suit was brought in the Court of the Subordinate Judge of Sultanpur to recover from the defendant, the talukdar of Deogaon, in the district of Fyzabad, a half-share of certain non-Talukdari property to which the plaintiff claims to be entitled by right of inheritance under the Mahommedan law.

At the time of the annexation of Oudh the taluka of Deogaon was found to be in the possession of one Babu Jamshed Ali Khan under a firman of the deposed King, bearing date the 23rd Shaban 1271, corresponding with the 11th May, 1855. On the 19th December, 1858, a summary settlement of this property was made with him by the British Government. The *Kabuliat*, or engagement for the payment of revenue, executed by Jamshed Ali Khan, bears date the 22nd January, 1859. On the 17th October, 1861, he received a *Sanad* conferring on him "the full proprietary right, title, and possession" of the estate of Deogaon and of Almasgunj, consisting of the villages in the list attached to his *kabuliat*. This *Sanad*, among other conditions, declared as follows:—

"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir, *i. e.*, sons, nephews, &c., according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part by sale, mortgage, gift, bequest, or adoption, to whomsoever you please."

Jamshed Ali Khan died in 1865; his name, however, is found entered as talukdar in the lists 1 and 2 mentioned in Act I of 1869 (the Oudh Estates Act).

(1) (1913) L. R. 40 I. A. 170; 18 C. L. J. 200; I. L. R. 35 All. 391.

He was succeeded by his son Raja Azam Ali Khan, who appears to have acquired between 1868 and the time of his death, considerable property, movable and immovable, which, not coming within the meaning of the word "estate," defined in Act I of 1869, is usually called the non-Talukdari property. The plaintiff's claim relates to a half share of this property on the ground that it is not subject to the rule of devolution applicable to the estate or taluka.

Rajah Azam Ali Khan died in October 1899, leaving two sons, Mustafa Ali Khan and the present plaintiff; and the former as the elder succeeded to the estate by the rule of primogeniture in accordance with the provisions of the *Sanad* and the rule laid down in section 22 of the Act. He also obtained possession without dispute, so far as appears on the record, of all the non-talukdari property, and held the same until his death in July 1909, when he was succeeded by his son, the minor defendant, Yasin Ali Khan.

The plaintiff brought his suit on the 12th April, 1910, and the main basis of his claim is that the property in dispute is not subject to the rule of succession by primogeniture, which regulates the descent of the taluka, but is governed by the ordinary Mussulman law of inheritance, and that accordingly Mustafa Ali Khan and he became entitled on the death of their father to equal shares in the same.

The defendant in his answer pleaded that the property in dispute was an accretion to the ancestral estate, and was, therefore, subject to the same rule of descent as the taluka, and that even if it were not so regarded, his father, and, on the death of his father, he himself became under the old family custom solely entitled to the said property. These contentions took a concrete shape in the statements of the respective pleaders recorded by the Subordinate Judge on the 14th June, 1910. The plaintiff's pleader appears to have stated that the present claim was exclusively confined to properties that had been acquired by Rajah Azam Ali Khan, and did not relate to the taluka; and he contended that Act I of 1869 applied neither to the taluka nor to the villages in dispute, though the taluka descended to a single individual by the rule of primogeniture under the *Sanad*. He further denied the existence of any family custom. The defendant's pleader, on the other hand, urged that the Act applied to both classes of property, and that, apart from the Act, family custom governed the descent of such property as was not included in the estate under the Act.

The sixth issue framed by the Subordinate Judge relates to the question of custom, and is in these terms:—

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"6. Whether there exists any custom in the family of the parties relating to the acquired property, under which a single member becomes the owner, and according to which the father of the defendant and the defendant alone became entitled?"

The onus of establishing the family custom was placed on the defendant; and although his pleader appears to have objected that this burden was wrongly thrown on him, he produced a considerable body of evidence, oral and documentary, in support of his allegation regarding the course of descent relating to the family property. The plaintiff in rebuttal, as it is called, of the case made by the defendant, gave his own evidence and examined his sister, a lady of the name of Kaniz Batul, widow of the late Nawab of Hasanpur. He also produced some *Wajib-ul-Arz*, or village administration papers for several years ranging from 1864 to 1873. To these their Lordships will refer, very shortly, later on.

On the question whether Act I of 1869 applied to the estate of Deogaon, the Subordinate Judge held in substance that as Jamshed Ali Khan had died before it came into force, his name was wrongly entered in the lists prepared under the Act; and that consequently, the statute not being applicable, no presumption with regard to custom could arise thereunder.

This view as to the non-applicability of the Act to the taluka itself, which was not attempted to be supported before this Board, was rightly overruled by the learned Judges on appeal, and their Lordships will not refer to it further. Having held that no presumption could arise from the inclusion of the taluka in List 2 as the Statute did not apply to it, the Subordinate Judge proceeded to consider the evidence. Among this were two important documents, one a petition of Rajah Azam Ali Khan bearing date the 27th May, 1873, presented to the revenue authorities, and the other a written statement filed in Court on the 15th February, 1868. In both there were clear and explicit statements of the deceased Rajah regarding the custom which governed the devolution of property in his family. Both these statements the Suborninate Judge ruled out of consideration as he thought they referred only to the taluka, and had, therefore, no bearing on the question of succession to the non-talukdari property.

Dealing with the oral evidence, thus detached from any support from the documents, the trial Judge characterises the defendant's witnesses, many of whom appear to be men of substance, and some of standing and position, as "tutored," and their testimony as wholly untrustworthy; and, relying on the *Wajib-ul-Arz* papers, and in

some measure on the statements of the plaintiff's sister, he came to the conclusion that the defendant had failed to prove the custom alleged by him. He accordingly decreed the plaintiff's claim. This decision has been reversed on appeal by the Judicial Commissioners, who have dismissed the suit with costs in both Courts. Shortly stated, they have held that the estate of Deogaon is within the statute, and by virtue of the provisions of the Act there was a presumption in favour of a pre-existing custom attaching to the taluka which threw on the plaintiff in this case the onus of showing that the non-talukdari property was subject to a different rule of devolution. They also considered the oral testimony adduced by the defendant as reliable, and referred to Rajah Azam Ali's statements with regard to the custom of the family as showing that he made no distinction between ancestral and acquired property.

The judgment of the Judicial Commissioners has been assailed in this appeal chiefly on two grounds: *firstly*, it is contended that the presumption on which the learned Judges have mainly rested their decision, has been wrongly raised and wrongly applied; and, *secondly*, that the onus has been wrongly thrown on the plaintiff, inasmuch as it lay on the defendant, as established in *Janki Pershad Singh's case*, (1) known locally as the *Ranimau Case*, to prove affirmatively the custom alleged by him. The two points are so closely inter-related that their Lordships do not propose to discuss or consider them separately.

The contentions of the parties on the question of presumption rest on the provisions of sections 8 and 10 of the Act; and although these sections have formed the subject of discussion in several previous decisions of this Board, it becomes necessary again for the purposes of this judgment to refer to them shortly. Section 8 provides that "within six months after the passing of the Act the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor-General of India, shall cause to be prepared six lists, namely, *first*, a list of all persons who are to be considered Talukdars within the meaning of the Act." As already observed, a summary settlement of the Government revenue had been made with Jamshed Ali Khan on the 22nd January, 1859, a Talukdari *Sanad* was granted to him on the 17th October, 1861, and his name was entered as a talukdar in the first of the lists. He had acquired, as declared by section 3, "a permanent, heritable, and transferable right" in his estate, and was unquestionably a talukdar within the meaning of the Act. His death before the Act

(1) (1913) L. R. 40 I. A. 170; 18 C. L. J. 200.

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was passed into law makes no difference in his status or in his rights. The lists which the Chief Commissioner was directed to "cause to be prepared" were obviously in course of preparation long before the passing of the Act; the limit of six months was clearly meant as a limit for their completion, and not for their initiation. In fact it is beyond dispute now that Jamshed Ali and his heirs and successors to the estate are such talukdars.

List 1 is a general list of all Talukdars, without distinction as to the course of descent in their families in respect of the Taluka. The classification of Talukdars on the basis of the devolution of the estate begins with list 2, which is "a list of Talukdars whose estates, according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir." The use of the word "ordinarily" clearly implies that an occasional variation would not affect the "custom" of devolution.

The third is "a list of the Talukdars, not included in the second of such lists, to whom *Sanads* or grants have been or may be given, or made by the British Government, up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such *Sanads* or grants shall thereafter be regulated by the rule of primogeniture."

On behalf of the appellant, it is contended that although the name of Jamshed Ali Khan is included in list 2, the fact that the succession is declared in the *Sanad* to go by primogeniture shows that the estate really came under list 3 and not under list 2, and that, consequently, no presumption as to a custom relating to the descent of the estate can arise. In support of this contention, reference is made to the Chief Commissioner's circular, dated the 18th day of January, 1860, by which the Talukdars were invited "to file a written declaration," expressing their desire that their estates should not be subdivided at their death "or in any future generation." A similar expression of wish was invited from such Talukdars as had received *Sanads*, "and in whose families the law of primogeniture does not prevail."

It appears that in response to this invitation, Jamshed Ali Khan submitted, on the 6th day of February, 1860, the following representation :—

"Sir,

"The British Government has been pleased to confer upon me the proprietary rights of the Deogaon estate, Pargana Jagdispur, District Fyzabad. I, therefore, wish and pray that after my death my estate may be allowed to continue in my family, generation after

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generation, in its entirety, without partition, according to the custom of *raj-gaddi*, and the younger brother may get the maintenance from the *gaddi-nashin*."

It is urged that these two documents, taken together, show that family custom or usage did not form the basis of the declaration as to the rule of descent by primogeniture, which does not come under list 2 but comes only under list 3. This proposition is attempted to be supported by reference to certain dicta, or rather expressions, of this Board in the case of *Achal Ram* v. *Udai Partab* (1), and in that of *Thakur Ishri Singh* v. *Baldeo Singh* (2), The appellant's contention receives some colour from the words of Sir Barnes Peacock, who delivered the judgment of the Board in *Achal Ram's case* (1), "that when a Talukdar's name was entered in the second list and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture." But it must be observed that that case proceeded on its own special facts; the talukdar Pirthi Pal Singh, whose name had been entered in list 2, had died before the Act came into force; there was no dispute, however, that the succession to his estate was governed by the Act. He left no heir coming within the first five sub-sections of section 22, and the property had accordingly "descended" to the widow, who held it for her lifetime; and after her death it was held by her daughter. On the death of the daughter, Achal Ram, her husband, took possession of the estate. The suit by Udai Partab was brought to recover possession of the estate from Achal Ram, on the ground that he, Udai Partab, was entitled as the nearest male agnate of the deceased talukdar. The case really fell within sub-section 11 of section 22, and the issue relating to descent by right of lineal primogeniture did not directly arise in it.

Their Lordships think that the views expressed by Sir Barnes Peacock must be read in conjunction with the facts of the case and ought not to be extended so as to exclude the rule of descent by primogeniture from the scope of list 2. In fact, in *Thakur Ishri Singh's case* (2), decided shortly after, where also the deceased talukdar's name was inserted in lists 1 and 2, Sir Arthur Hobhouse (afterwards Lord Hobhouse) delivering the judgment of the Board used the following language: "Now, however true it may be that if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the rule of

(1) (1883) L. R. 11 I. A. 51 ; I. L. R. 10 Calc. 511.
(2) (1884) L. R. 11 I. A. 135 ; I. L. R. 10 Calc. 792.

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primogeniture, it is impossible to say there is no such guide in this case." It was found in *Thakur Ishri Singh's* case (1) that the deceased talukdar Bani Singh had in his lifetime, on the 20th February, 1860, in answer to the Chief Commissioner's circular letter already referred to, stated the usage in his family to be the selection of "an able one" out of several sons "without reference to seniority" to succeed to the estate; "that is to say, according to him," adds Sir Arthur Hobhouse, "that law which is familiar to us under the name of tanistry, or something very like it, prevailed in his family." The conclusion is thus expressed :—

"The question is, whether the appellant, having the *onus probandi* on him to show that primogeniture is the law of the family, has proved his case; and he certainly is very far indeed from proving his case, the evidence, so far as it goes, being the other way."

This decision certainly does not exclude descent by rule of primogeniture, from the scope of list 2; whilst section 22 expressly declares that succession *ab intestato* to the estates of Talukdars whose names are inserted in list 2 equally with those entered in lists 3 and 5 shall be by lineal primogeniture. It provides in the first three sub-sections as follows :—

"If any Talukdar or Grantee whose name shall be inserted in the second, third, or fifth of the lists mentioned in section 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, viz. :—

"(1) To the eldest son of such talukdar or Grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased;

"(2) Or if such eldest son of such talukdar or Grantee, heir or legatee, shall have died in his father's life-time, leaving male lineal descendants, then to the eldest and every other son of such eldest son successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid;

"(3) Or if such eldest son of such talukdar or Grantee, heir or legatee, shall have died in his father's life-time without leaving male lineal descendants, then to the second and every other son of the said talukdar or Grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid."

The amendments made by the Oudh Estates (Amendment) Act of 1910 do not affect the matter.

(1) (1884) L. R. 11 I. A. 135; I. L. R. 10 Calc. 792.

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Their Lordships are, accordingly, of opinion that there is no substance in the contention of the appellant based on the difference in the phraseology of section 8 relative to lists 2 and 3 that descent by primogeniture is confined to cases coming under list 3. Section 10 of the Act after declaring that "no persons shall be considered talukdars or grantees within the meaning of the Act, other than the persons named in such original or supplementary lists as aforesaid," (S. 9) provides that "the Courts shall take judicial notice of the said lists and shall regard them as a conclusive evidence that the persons named therein are such talukdars or grantees," that is, "within the meaning of the Act."

This does not mean they shall be conclusive merely as to the fact that the persons entered therein are talukdars as defined in section 2 : in their Lordships' opinion, the provision of section 10 goes much further ; it means that the Courts shall regard the insertion of the names in those lists "as a conclusive evidence" of the fact on which is based the status assigned to the persons named in the different lists. For example, in list 2 such talukdars alone are included, whose estates, according to the custom of the family "on and before the 13th February, 1856" (the date of the first Annexation of Oudh), "ordinarily descended upon a single heir." Their title to have their names inserted in that list is based on the specific family custom set out in the section. Under section 10 the Courts are bound by the statute to regard as conclusive the fact that there was such a pre-existing custom attaching to these estates on which their inclusion in list 2 was based.

In the present case Jamshed Ali Khan's name was included in list 2 ; it could only have been done by virtue of a pre-existing custom governing the devolution of the estate to a single heir. Section 10 makes the entry of his name in list 2 conclusive evidence of that fact. There is no dispute that in this case the estate descends by lineal primogeniture ; the only question for determination is whether the custom which has thus received statutory affirmation with respect to the estate attaches also to the non-talukdari property, and governs its devolution.

The provision as to the conclusiveness contained in section 10 is confined to estates within the meaning of the Act ; it does not apply to non-talukdari property. The existence, however, of the pre-existing custom gives rise to a presumption. It is urged on behalf of the appellant that this presumption is not enough ; and that the defendant must establish affirmatively the course of descent alleged by him. The contention that the onus lies primarily on the

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defendant is supported by a reference to the decision of their Lordships in the case of *Janki Pershad Singh* v. *Dwarka Pershad Singh* (1). The plaintiff in that case had obtained a decree in the Courts in India for a half-share of the after-acquired properties of the talukdar, on the ground that the defendant had failed to establish that by the custom of the family these acquisitions became part of the original estate, and were, therefore, not subject to the ordinary rules of inheritance; and this decree was upheld by this Board. That case had arisen in a family subject to the law of the Mitakshara, which recognises two courses of devolution in the case of what is called "obstructed inheritance": the ancestral property descending in one channel, the self-acquired property in another. Even where the estate is impartible, this distinction in the course of descent is recognised. This is exemplified in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer* (2), (a case under the Oudh Estates Act), where, in making the decree, their Lordships added the following limitation :—

"The declaration, however, must, their Lordships think, be limited to the Taluk and what passes with it. If the Maharajah had personal or other property not properly parcel of the Talukdari estate, that would seem to be descendible according to the ordinary law of succession."

Similar differentiation was made in another Mitakshara case, which, however, did not arise in Oudh, but which equally exemplifies the rule : *Rani Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (3).

Unless there be a custom by which self-acquired properties in a Mitakshara family become part of the ancestral estate, or unless it be shown that the person acquiring the same intended to incorporate such acquisitions with the estate, they descend by the ordinary law of inheritance. For example, where the owner of an ancestral, impartible estate, possessed also of self-acquired properties, dies leaving lineal male descendants, as the inheritance is "unobstructed," both classes of property go to them; supposing, however, he were to die leaving no male progeny in the direct line, but a widow and a divided agnatic relation, in the absence of a custom the self-acquired property would go to the widow, whilst the estate would devolve on the agnatic heir. The onus of establishing a custom *dehors* the ordinary rule in such a case would lie on the person

(1) (1913) L. R. 40 I. A. 170; 18 C. L. J. 200.
(2) (1877) L. R. 4 I. A. 228 (246); I. L. R. 3 Calc. 626.
(3) (1902) L. R. 29, I. A. 98; I. L. R. 29 Calc. 433.

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asserting it. This was the principle on which their Lordships proceeded in *Janki Pershad Singh's case* (1).

The Mahommedan Law makes no distinction between ancestral and self-acquired property, and recognises no principle of differentiation in the matter of lineal and collateral succession, as is the case under the *Mitakshara* which divides inheritance into "unobstructed and obstructed heritage." All classes of property, whether ancestral or self-acquired, follow one rule of devolution. If a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the taluka to establish it.

Their Lordships are of opinion that the Judicial Commissioners in the present case were right in holding that the Subordinate Judge had wrongly placed the onus on the defendant. As already observed, a pre-existing custom relating to the descent of the ancestral estate to a single heir received statutory affirmation in 1869. The presumption is, the family being Mahommedan, that prior to 1856 the same rule of devolution applied to the self-acquired property of the previous owners, and applies to the acquisitions of Rajah Azam Ali Khan. That presumption the plaintiff has sought to rebut by statements and recitals contained in a number of *wajib-ul-arz* papers. A *wajib-ul-arz* is a village administration paper, prepared by a village official, in which are recorded the statements of persons possessing interests in the village relative to existing rights and customs. As such they are of considerable value in the determination of such rights and customs. But statements which merely narrate traditions and purport to give the history of devolution in certain families not even of the narrators, stand in no better position than any other tradition.

The following facts connected with Jamshed Ali Khan's family will make this absolutely clear. It may be taken as a historical fact that some four centuries ago a Rajput adventurer of the name of Barawand Singh or Raja Barar, of the Rae Bareilly district, raided into the Fyzabad district, and after ousting the Bhar inhabitants from their ancient possessions, established himself there with his clan, apparently since then called the *Bhale Sultan* clan, on account of their prowess with the pike or lance. Barar's descendants appear to have multiplied immensely; some have remained Hindus, others have adopted the Moslem religion. Tradition ascribes the adoption

(1) (1913) L. R. 40 I. A. 170; 18 C. L. J. 200.

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of Islam to one of the early descendants, named Palandeo, who lived in the time of the Afgan Emperor Sher Shah, from whom he is said to have received the title of Malikpal. This Malikpal is claimed as the progenitor of the Mussulman section of the *Bhale Sultan* clan. The fourth in descent from Malikpal was Pahar Khan, with whom, according to the defendant's case, began the origin of the Daogaon estate. The Pahar Kani section of the Mussulman Bhale Sultans, to which the Talukdar of Daogaon belongs, trace their descent to him, whilst the Mubarak Khanis derive their origin from Mubarak Khan, his brother. The talukdars of Mahona and of Uchgaon are Mubarak Khanis. The son of the talukdar of Mahona (in the absence of his father in Mecca) has given evidence in this case on the side of the defendant on the question of the custom ; so has the talukdar of Uchgaon. Jamshed Ali Khan was the eighth in descent from Pahar Khan.

The *wajib-ul-arz* papers, on which the plaintiff relies, contain the statements of a number of Bhale Sultans, both Hindu and Mussulman, regarding the origin of their respective title to the lands they hold in the several villages to which these papers relate. The history of their title is based purely on family tradition. They describe how after Barar and his clan settled in this district his descendants continued to split up, until several of them formed stocks of their own. In no case, however, they appear to bring down the tradition of division beyond Pahar Khan. The plaintiff admits in his deposition that there has been no partition of the family property since the time of Alahdad Khan, the third in descent from Pahar. His own statement lends strong corroboration to the large volume of concurrent testimony regarding the rule or custom governing the descent of the entire family property, whilst the *wajib-ul-arz* papers, on which the first Court relied, do not support the case put forward for him.

In their Lordships' opinion, the plaintiff has failed to establish, that the devolution of the non-talukdari property is subject to a rule different from that governing the estate, and that his claim was rightly dismissed in the Judicial Commissioners' Court. Their Lordships will, therefore, humbly advise His Majesty that the decree of the appellate Court should be affirmed, and this appeal should be dismissed with costs.

Watkins and Hunter :—Solicitors for the Appellant.

Barrow, Rogers and Nevill :—Solicitors for the Respondents.

J. M. P. *Appeal dismissed.*

PRESENT: *Lord Shaw, Lord Parmoor and Mr. Ameer Ali.*

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DIWAKAR

v.

CHANDANLAL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

Adoption—Evidence—Proof—No reference to expenditure on the ceremony in the account books produced.

The absence of any reference to expenditure on the ceremony of adoption either in the account books of the natural or the adoptive father which were put in evidence, was held to strongly corroborate the case against adoption.

Lal Kunwar v. *Chiranji Lal* (1) followed.

Although neither written acknowledgments, nor the performance of any religious ceremonial, are essential to the validity of adoptions, such acknowledgments are usually given and such ceremonies observed and notices given of the times when adoptions are to take place, in all families of distinction, such as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves the Court to regard with extreme suspicion the proof offered in support of adoption. In no case should the rights of wives and daughters be transferred to strangers, or more remote relatives, unless the proof of adoption, by which the transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth.

Sootrugun v. *Sabitra* (2) followed.

Appeal from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces, (April 16, 1910), reversing those of the Court of the District Judge, Bhandara (March 8, 1909).

The question was whether the appellant was adopted by one Mahipat Rao as his son. The District Judge decided in favour of the adoption, but on appeal the Court of the Judicial Commissioner held against it. The appellant then brought the present appeal.

De Gruyther, K.C., and *J. M. Parikh*, for the Appellant, submitted that the oral evidence alone proved the adoption.

Sir Robert Finlay, K.C., *Sir Erle Richards, K.C.*, and *Dunne*, for the Respondents, referred to *Sootrugun v. Sabitra* (2), and *Musummat Lal Kunwar* v. *Chiranji Lal* (1), and submitted that the adoption was not proved.

De Gruyther, K.C., replied referring to Mayne on Hindu Law and Usage, 8th ed, p. 202, par. 157 and the Indian Evidence Act, section 3, when is 'a fact said to be proved.'

(1) (1909) L. R. 37 I. A. 1; I. L. R. 32 All. 104.
(2) (1834) 2 Knapp. 287 (290-1).

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The judgment of their Lordships was delivered by

Lord Parmoor.—The only question raised in this appeal is whether the late Mahipat Rao Bhau adopted the appellant Diwakar as his son, and heir to the Hatta Zemindari on the 10th November, 1898. If the adoption did take place, the adoptive father could not subsequently revoke the adoption. It is not argued that he had any such power.

The appellant was born on the 26th October, 1898, and was the second son of Indraraj Bhau. Mahipat Rao was a relation on the agnatic side and had had eight children by his deceased wife, all of whom had died in infancy, except Gotoo, who died in 1894, aged about 16. At the time of the alleged adoption Mahipat Rao had two young wives, one married in 1891, and one in 1895. There was no reason why he might not have further issue; two children were in fact born to him at a later date. Both Indraraj and Mahipat Rao were Zemindars of considerable position.

There was no deed of adoption and the case for the appellant depends almost entirely on oral testimony. The Judge of the District Court found in favour of the appellant. This judgment was reversed in the Court of the Judicial Commissioner, Central Provinces. In their Lordship's opinion it is important to appreciate the general position of the parties and the surrounding circumstances before attempting to determine what weight should be attached to the evidence called on behalf of the plaintiff.

Indraraj, the appellant's father, resided at Fulchur. Mahipat Rao with his two wives, respondents Nos. 2 and 3 went to Fulchur to be present at the appellant's Barsa, a ceremony performed twelve days after the birth of an infant. They stayed at Fulchur a few days after the Barsa and the alleged adoption is said to have taken place on the 10th November, 1898. Subject to two matters, to which attention will be drawn, it is clear that Mahipat Rao from the outset and during his life consistently denied that the plaintiff was his adopted son. A letter of the 10th February, 1899, written only three months after the date of the alleged adoption supports the case of the respondents and is inconsistent with that of the appellant. This letter refers to arrangements having been made "for taking off younger Bhau's Zalar near Pinglai Goddess on the 18th February, 1899." In reference to this letter, Indraraj says in his evidence: "The removal of the first hair of a boy in my family is made in the temple of Pinglai at Bhandara." When the appellant's hair was removed Mahipat Rao was invited, but for some reason

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or other he was unable to attend. It is further stated that Mahipat Rao did not bring his children to Bhandara to be shaved, and that he had not written to Indraraj in reference to the ceremony. At some time between the 11th January, and the end of March, 1899, Kaluram Pauchourey, District Saugor, visited Mahipat Rao, and had a talk with him about the adoption of the boy. His evidence is that Mahipat Rao told him that the members of Lataria Bhau's family expressed to him a desire that the new-born son might be adopted by him, but that he did not express his willingness, or agree to the proposal. In August, 1902, Indraraj was told by Mr. Laurie that Mahipat Rao was denying that he had adopted the appellant, and Indraraj states that after this denial he had no talk with Mahipat Rao about the adoption. The evidence of Mr. C. E. Low, who was Deputy Commissioner of Balaghat throughout the year 1905, is to the same effect. He says that Indraraj had a talk with him about the marriage of his son (the appellant), and that Indraraj asked him to persuade Mahipat Rao to admit that he had adopted the appellant. After this conversation Mr. Low saw Mahipat Rao, who said that he did not admit the adoption and could not bear the expenses of the appellant's marriage. On the 17th January, 1907, Indraraj wrote to Mahipat Rao, saying that it was eight years since he had taken the appellant in adoption, and that the marriage ceremony of the appellant could not under any circumstances be postponed. On the 26th January, Mahipat Rao replied, saying that the whole story was false and that the act of adoption had not been done at all. It is unnecessary to examine further this part of the case since the counsel for the appellant was unable to point to any act or statement of Mahipat Rao which in any way admitted the adoption of the appellant, except a statement in a letter written by Kelkar in 1902, and an alleged procession at Hatta on the 2nd June, 1901, at which date it is said that the appellant was taken to Hatta with his natural parents with some pomp, and that the visit was the occasion of considerable rejoicings. The incident of the alleged procession at Hatta is put forward as an important factor in the plaint of the appellant, but the evidence was disbelieved by both Courts, and throws suspicion on the appellant's case.

Kelkar was the pleader representing the respondents, but called as a witness on behalf of the appellant towards the end of the appellant's case. A letter said to have been written by Kelkar to Indraraj on the 2nd February, 1902, was produced, in which Kelkar said that Mahipat Rao admitted that the appellant was his

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son. The importance of the letter is that it supports the view that Mahipat Rao did admit on this occasion the adoption of the appellant. Kelkar himself states that he had a talk about adoption with Mahipat Rao subsequent to the letter, and that Mahipat Rao then emphatically denied the adoption, and that to his recollection Mahipat Rao never at any other time made any admission as to the adoption, and that his impression was that Mahipat Rao was denying the adoption, and that he said so to Mr. Low and Mr. Bathurst. Their Lordships cannot attach any importance to a letter produced under such circumstances, and which contains a statement in direct contradiction of what is proved to be the general attitude of Mahipat Rao in denying the adoption of the appellant. There is no reason to doubt that Mahipat Rao did from the outset consistently deny that he had adopted the appellant. Under these circumstances it is a matter for grave suspicion that, though it was open to Indraraj to commence a suit claiming to have the adoption of the appellant declared valid, no such suit was commenced until two and a half months after Mahipat Rao's death.

The case for the respondents is further strongly corroborated by the absence of any reference to expenditure on the ceremony of adoption, either in the accounts of Indraraj or Mahipat Rao. The importance of the evidence afforded by accounts has been recognised by this Board : *Musummat Lal Kunwar* v. *Chiranji Lal* (1):—

"Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book, in which anything connected with the ceremony was entered covers the plaintiff's case with suspicion."

The accounts of Indraraj are set out in the record starting from the 6th November, 1898, and extending over the period in which the adoption is said to have taken place. There are a number of items of expenses incurred in connection with the appellant's Barsa, but not a single item of expenditure in reference to the ceremony of adoption, or any entry which indicates that any such ceremony ever took place. It was suggested that the expenses of the ceremony of adoption might be found in the accounts of Mahipat Rao as the adoptive father. Mahipat Rao's accounts set out in the record tell the same story. There is no item of any expense incurred in the ceremony of adoption, although a considerable sum is included under the head of Barsa expenses.

(1) (1909) L. R. 37 I. A. 1 ; I .L. R. 32 All. 104.

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There was no deed of adoption or any other formal written record of the event at the time. The appellant's horoscope was produced at the hearing by the family astrologer, but if any importance is to be attached to this document it is not to the advantage of the appellant's case. This document was filed on the 25th October, 1907. The witness alleges that the red ink postcript, reciting the appellant's adoption, was written on his return after performing the ceremony, but it is made more than suspicious by the addition of the names of Mr. Rajuram and Prated. The detailed horoscope was prepared two years after the birth of the appellant, but it describes him as the son of his natural father and there is no reference to adoption except in the passage which has been specially translated. This passage predicts evil to the adoptive father eight years after the appellant's birth, and it is difficult to avoid the conclusion that it was prepared after the death of Mahipat Rao. Although a deed of adoption, or a formal written record of the fact of adoption, may have to be carefully scrutinised if forgery is alleged, it is certainly remarkable that in such a case as the present no deed or other formal written record can be produced which gives any support to the claim made on behalf of the appellant. This Board in the case of *Sootrugun* v. *Sabitra* (1) said—

"Although neither written acknowledgments, nor the performance of any religious ceremonial, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of Zemindars or opulent Brahmins, that wherever these have been omitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relatives, unless the proof of adoption, by which that transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth."

It is an additional factor that no feast is proved to have taken place on the occasion of the adoption, that the ceremonies, said to have been performed, were of the briefest possible description, that no form or notification was made to the authorities, that the child's name was not changed, and that he was never taken to live with his new family or recognised by them in any way. It is not too

(1) (1834) 2 Knapp. 287.

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much to say that not only do their Lordships find no act or documents to support the claim of the appellant, but that, on the contrary, all the surrounding circumstances and conditions point in the opposite direction and make it highly improbable that Mahipat Rao did adopt the appellant at the alleged date.

Their Lordships have carefully considered the oral evidence and have come to the conclusion that, having regard to the conditions and circumstances already mentioned, it is quite insufficient to support the case of the appellant. They agree with the view of the Judicial Commissioner and think it is unnecssary to analyse the evidence in detail. There are, however, two witnesses of special importance, Indraraj and Mr. Rajaram. Much reliance was placed upon the evidence of Mr. Rajaram, but in reality it gives no support to the appellant's claim. Mr. Rajaram knew Indraraj, but did not remember to have seen Mahipat Rao except on one or two occasions in Fulchur. He remembered going to Fulchur from Gonda on one occasion, and sat in the mandap which was erected for receiving guests for some ceremony. He was received by Mahipat Rao, but cannot recollect whether he said to him that he had a mind to adopt the appellant, or that he had adopted him. He was present about half an hour, and no ceremony of any kind was performed in his presence. He did not consider the talk of any importance to him in his private or official capacity. He is not prepared to contradict Mahipat Rao if he said that he merely intended to adopt the plaintiff, but that there was no form or complete adoption. It is on this evidence that the District Judge appears largely to base his opinion that the appellant had been adopted by Mahipat Rao, but their Lordships cannot attach the same weight and importance to it, and consider it to fall far short of the requirements necessary to establish the fact of adoption when there is no need or formal written document, and all the surrounding facts point to a different conclusion.

The inconsistencies in the case put forward on behalf of the appellant, are attempted to be explained on the view that Mahipat Rao was in the first instance very desirous to adopt the appellant, and that he subsequently changed, or was persuaded to change, his opinion. This theory of the attitude of Mahipat Rao runs through the evidence of Indraraj, but there is nothing to corroborate his evidence or to give it probability. He says that on the next day, after the Barsa ceremony, he came to know that Mahipat Rao wanted to adopt the plaintiff, and that on his refusal, Mahipat Rao was displeased, and began to make preparations to leave the next

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day, and that, consequently, after consultation with his relatives, he came to the conclusion that there was no harm in giving this boy in adopiion, that the adoption took place the same or the next day, and that Mr. Rajaram was present. There is no doubt that it was the interest of Indraraj that the appellant should be adopted as the son of Mahipat Rao, and heir to the Hatta Zamindari, and if the adoption took place that it should take place under conditions which would not lead to subsequent doubt and dispute. It appears not only that no such precautions were taken, but that there is no explanation of the haste with which the alleged ceremony is said to have been performed or the absence of all formal record of so important an event. The remainder of his evidence is equally unsatisfactory. The incidents of the ceremonial visit to Hatta are not believed in either Court, there is no explanation of the continued residence of the appellant at the home of his natural father, or of the removal of the first hair of the boy in the temple of Pinglai at Bhandara, or of the arrangements for his marriage which Mahipat Rao declined to attend.

In August 1902 Indraraj went to Nagpur when Mahipat Rao attended a meeting of the Police Commission. He admits that, while at Nagpur, he heard from Sir A. Fraser, Mr. Craddock and Mr. Laurie that Mahipat Rao denied the adoption of the appellant, and there is no doubt that at this time Mahipat Rao's attitude had raised a serious question in the mind of Indraraj, but he took no steps to establish the fact of adoption. Their Lordships are not satisfied of the accuracy of the account of Indraraj's interview with Mahipat Rao on his return from Nagpur. Their Lordships have already referred to the letter said to have been written by Kelkar and its production does not tend to make the evidence of Indraraj more trustworthy. It is said that Indraraj is an Honorary Magistrate who has received from Government the title of Rao Bahadur, and that it is unlikely that such a person would bring a false case into Court. Their Lordships do not forget this consideration, but are unable to come to any other conclusion than that the evidence of Indraraj cannot safely be relied on and that it is not so free from all suspicion of falsehood and so consistent and probable in itself that it can be accepted as establishing the claim of the appellant, either of itself, or in conjunction with the other evidence adduced on the appellant's behalf.

In the result their Lordships agree with the conclusions of the Judicial Commissioner and will humbly advise His Majesty that the

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appeal be dismissed. Indraraj Bhau must personally pay the respondent's costs.

Edward Dalgado :—Solicitor for the Appellant.

Latteys and Hart :—Solicitors for the Respondents.

J. M. P. *Appeal dismissed.*

APPELLATE CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

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RAM BARMAN AND OTHERS

v.

SANAT KUMAR DAS AND OTHERS.*

Mortgage bond—Evidence Act (I of 1872), Sec. 92—Oral evidence as to splitting up, if admissible—Interest, rate of—Stipulation by way of penalty—Contract Act (IX of 1872), Secs. 44, 74.

Oral evidence is not admissible to prove an agreement between a mortgagor and mortgagee whereby a contract contained in the registered mortgage bond was split up.

A Court is competent to grant relief whenever the rate of interest appears to the Court to be penal, although the provision for payment of interest mentions one rate only.

Khagaram v. *Ram Sankar* (1) followed.

What constitutes a stipulation by way of penalty is to be determined in each individual case upon its own special circumstances.

Under the circumstances of the case, it was held that an agreement to pay interest at 75 per cent. per annum was a stipulation by way of penalty within the meaning of section 74 of the Contract Act.

Appeal under section 15 of the Letters Patent by the Defendants.

Suit to enforce a mortgage granted by six persons, some of whom were defendants, and others the representatives of the deceased mortgagors. The Court of first instance found that the plaintiffs

* Letters Patent Appeal No. 40 of 1914, against the decision of Mr. Justice Teunon, dated the 27th February, 1914, in Appeal from Appellate Decree No. 56 of 1911 against the decree of T. J. Jaffries Esq., District Judge of Cachar, dated the 2nd September, 1910, modifying that of Babu Saroda Prosad Sen, Subordinate Judge of Cachar, dated the 10th January, 1910.

(1) (1914) I. L. R. 42 Calc. 652; 21 C. L. J. 79.

had released one of the six mortgagors on receipt of a proportionate share of the mortgage money together with interest and passed a decree for Rs. 1307 to be realised by sale of that portion of the mortgaged premises which had not been released. On appeal, the learned District Judge held that interest at the rate of Rs. 75 per cent per annum was not realisable, that interest should be allowed at the reduced rate of 15 per cent. per annum and that th. several mortgagors had paid up their respective shares of the mortgage money with interest. Consequently the ultimate decree of the District Judge was the dismissal of the suit. The plaintiffs thereupon appealed to the High Court. The appeal came on for hearing on the 6th February, 1914 before Mr. Justice Teunon, who delivered the following judgment :

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Teunon, J.—This is an appeal by the plaintiff in a suit brought on a mortgage bond dated 7th Pous, 1304, 21st December 1897.

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The bond was executed by six cacharis in favour of one Noaram Dass, the predecessor in interest of the plaintiff, secures the repayment of a sum of Rs. 200 with interest at the rate of one anna in the rupee per month, that is, 75 per cent. per annum and provides that the mortgagors shall be jointly and severally liable.

Of the six original debtors two are now dead and the suit (instituted on the 28th January 1909) is brought against the representative of those two and the four survivors. Their case was that though the bond was a joint bond yet there was a contemporaneous oral agreement with the mortgagee, that each mortgagor should be separately liable for $\frac{1}{6}$th of the sum advanced and the interest accruing due thereon, and that on the payment by any one of them of the amount due on his share, he and the property mortgaged by him would be released from all further liability. They further pleaded that such of the debtors had at different times paid the amount due from him and had thereupon secured his discharge.

In the plaint payments aggregating Rs. 443 have been credited to interest, and the claim was for a balance due of Rs. 1419-8. Both the Courts below have found that a further payment of Rs. 20 had been made by the second defendant Biswanath on the 4th Sraban 1306, and that on payment of a sum of Rs. 40 on the 17th Falgun 1304 (that is two months after the execution of the bond), rne of the debtors Girandas had in fact secured his discharge and the release of the property mortgaged by him. On these findings in the Court of first instance the learned Subordinate Judge decreed the suit for Rs. 1307 against the five remaining mortgagors or their representatives in interest. On appeal the District Judge held that

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the oral arrangement providing for the separate liability of each of the debtors in proportion to his one-sixth share had been proved, and that after the discharge of Girandas the mortgagee had procured the several payments subsequently made by the remaining five debtors by his representations and promises that each would be treated as separately and severally liable to the extent of one-sixth of the loan. He further found that the bargain was unconscionable and acting under section 16 (2) (b) of the Contract Act reduced the rate of interest to 15 per cent. that being in the opinion the reasonable rate in this locality on secured loans. An account being taken on this footing, it was found that each of the mortgagors had paid sums in excess of what was justly due and the plaintiffs' suit was therefore dismissed.

The plaintiffs now appeal to this Court, but in their appeal have limited their claim to the sum of Rs. 774-13-7. Their contentions before me are (1) that the defendants having admitted the voluntary execution of the bond and having pleaded no circumstances which would bring the case within the scope of section 16 (2) (b) of the Contract Act, the District Judge was in error in reducing the rate of interest and (2) that evidence of any contemporaneous or subsequent oral agreement modifying the terms of the registered mortgage bond or releasing the properties mortgaged from the liability thereunder was inadmissible.

The first contention of the appellants is clearly well-founded. The appellants admitted their free and voluntary execution of the bond. No issue on the question of undue influence was raised in the first Court. No doubt the defendants were in urgent need of money apparently in order that they should be enabled to fulfil their obligation under the law to supply transport coolies for the purposes of a frontier expedition. But it does not appear that they were already in debt to this money-lender and the circumstances relied on by the District Judge are not such as suffice to show that the money-lender was in a position to dominate their will. In this state of facts as the law stands the Courts can grant no relief against the exhorbitant rate of interest agreed upon. In support of this view I may refer to the cases of *Sundar Koer* v. *Rai Sham Krishen* (1); *Umesh Chandra* v. *Golap Lal* (2); *Prayag Kapri* v. *Shyam Lal* (3); and *Rameswar Koer* v. *Mahomed Mehdi* (4).

That a contemporaneous oral agreement varying or modifying the terms of the bond cannot be proved is clear from the language

(1) (1906) I. L. R. 34 Calc. 150.
(2) (1903) I. L. R. 31 Calc. 233.
(3) (1903) I. L. R, 31 Calc. 138.
(4) (1898) I. L. R. 26 Calc. 39 P. C.

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of section 92 of the Evidence Act. Similarly under proviso (4) to the same section in the case of transactions which the law requires to be in writing or where as here a disposition of property has been registered, subsequent oral agreements modifying and rescinding the contract may not be proved, and the doctrine of estoppel on which apparently the District Judge relies may not be invoked for the purpose of nullifying statutory provisions.

The release from liability of Girandas and of the property mortgaged by him being in writing has not been questioned before me.

In the result the decree of the District Judge is set aside. There will be a decree for the sum of Rs. 774-13-7. If within one month from this date the defendants 1 to 7 do not pay to the plaintiffs the sum decreed with interest at the bond rate on the principal sum namely five-sixths of Rs. 200 the mortgaged property other than the property appertaining to patta No. 16 in the name of Girandas will be sold. In view of the exorbitant rate of interest on the bond and all the facts I direct that from and after the date fixed above for payment, no interest shall run, and that the plaintiffs, appellants shall pay their own costs throughout; defendants respondents Nos. 8 and 9 shall have their costs throughout with interest at 6 per cent. from the plaintiffs, appellants.

Against this decision, the defendants preferred an appeal under section 15 of the Letters Patent.

Babus Manmatha Nath Mukerjee and *Satindra Nath Mukerjee* for the Defendants Appellants.

Babu Gobind Chunder Dey Roy for the Plaintiffs Respondents.

Babu Biraj Mohan Mojumdar for Defendants Respondents.

The judgments of the Court were as follows :

May, 17.

Sanderson C. J.—This case, in my judgment, raises a question of considerable importance, and we are much indebted to the three learned Vakils, who have argued the question before us, for their assistance.

It appears that so long ago as 1897, the mortgage in question was executed by six individuals, some of whom are defendants, and the others are now dead and their representatives are the other defendants in this case.

The mortgage was to secure a loan of Rs. 200, and it contained a provision that the loan should be repaid within two months with interest at the rate of one anna in the rupee per mensem, and in case of default the interest was to run at that rate till payment.

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Each of the six borrowers mortgaged a *hal* of land to secure the loan. Certain payments were made by some of these six individuals so that the result was that within a little more than six years from the date of the loan, the lender received Rs. 463 that is to say, the whole of his principal Rs. 200 and Rs. 263 by way of interest, which is considerably more than 100 per cent. He postponed bringing his action until 1909, and then the mortgagee sued for Rs. 1419 8 annas, which he alleged was the amount owing to him upon the mortgage, after deducting the payments which had been admittedly made.

The Court of first instance gave the plaintiff a decree but not for the full amount of his claim, but for Rs. 1307. Then the defendants appealed to the District Judge, who dismissed the suit altogether: He came to the conclusion that a collateral verbal agreement had been made between the plaintiff on the one hand and the defendants on the other, whereby the plaintiff gave the defendants to understand that he would hold each of them liable for his own share only and that when he accepted the various payments which were made, he verbally agreed to that effect. The learned Judge after reviewing the evidence carefully came to the conclusion that that agreement had in fact been made, and that consequently the original agreement which was contained in the mortgage bond was varied, and that having regard to that varied agreement the defendants had individually discharged their liabilities, and that consequently there was nothing owing to the plaintiff under the mortgage bond, and therefore he dismissed the suit altogether. The plaintiff appealed to this Court: and, Mr. Justice Teunon upon that point held that evidence of the verbal agreement upon which the District Judge had relied was not admissible, having regard to section 92 of the Evidence Act: and, in my judgment the learned Judge was right in coming to that decision. I think that the District Judge ought not to have admitted evidence of the verbal agreement, because it did in material respects vary the contract which was contained in the mortgage bond and I may point out one respect in which it varied the mortgage bond, that is to say, the mortgage bond by its terms provided that each one of the mortgagees was liable for the whole amount of the mortgage, namely Rs. 200 and interest; but the alleged verbal agreement provided that each individual who had executed the mortgage bond was liable for one-sixth of the Rs. 200 only: and, therefore, it is obvious that in that material respect, namely, in the provision for the repayment of the loan, the contract contained in the mortgage bond

was varied by the alleged verbal agreement, and consequently to my mind, the learned Judge was quite right in saying that evidence ought not to have been admitted to prove the alleged verbal agreement having regard to section 92 of the Evidence Act.

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It was then argued by the learned vakil for the appellant that even if the evidence as to the alleged verbal agreement could not be admitted to show the agreement, he could prove that he had made certain payments and those payments had been accepted by the plaintiff in full satisfaction of the claim. But that argument cannot be maintained, because, when one examines the facts one cannot say that the plaintiff accepted these payments in full satisfaction of the contract, for he was at the same moment insisting on his right to be paid not only the principal but interest at 75 per cent, and the payments in fact did not cover the principal and the interest at 75 per cent but only covered the principal and interest at 15 per cent. Therefore, the learned Judge was right in allowing the appeal upon that point.

Then comes the important question of the power of the District Judge to interfere with the agreement which was made between the parties as to the rate of interest namely 75 per cent.

Now, I do not intend to decide in this case that the circumstances amounted to undue influence within the meaning of section 16 of the Contract Act. I do not think it is necessary for the purpose of my judgment to come to any conclusion upon that point, and I do not express any opinion upon it. But I do think that this case comes within section 74 of the Indian Contract Act, interpreted as it has been by the decision of this High Court, with which decision I have no reason to quarrel. Section 74 provides, "when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for." Now, in this case the contract has been broken. The question is whether it contains any stipulation by way of *penalty*. If it does, then the party who is entitled to sue for the breach of the contract is entitled to recover nothing more than reasonable compensation; and, what is reasonable compensation must be settled by the tribunal before which the case comes. There is a provision in the section that 'reasonable compensation must not

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exceed the amount so named or, as the case may be, the penalty stipulated for.' It is obvious to my mind, as I have said, that what is reasonable compensation must be settled by the tribunal trying the case. In arriving at a conclusion as to whether this contract contains a stipulation by way of penalty, I am assisted by the decision in *Khagaram Das* v. *Ram Sankar Das Pramanik* (1) in which my learned brother Mr. Justice Mookerjee gave a judgment which was concurred in by my learned brother Mr. Justice Beachcroft: and, it is therein stated at page 662, as follows: "It is not of much moment to consider whether the Court can grant such relief in the exercise of its equitable jurisdiction or under section 74 of the Indian Contract as amended in 1899. It is sufficient to observe that although the section was originally framed to deal with the doctrine of penalty and liquidated damages as understood in the law of England, it is in its present form comprehensive enough to include the type of cases now before us, because it covers all cases where the contract contains any stipulation by way of penalty. The question consequently reduces in any concrete case to this; does the contract contain a stipulation by way of penalty. In the solution of this question, the observations of Lord Marsey in *Webster* v. *Bosanquet* (2) may be usefully borne in mind. The test is, was the agreement to pay the damage for the breach of covenant or contract unconscionable and extravagant, such as no Court ought to allow to be entered into." Now, when one is considering whether the agreement to pay interest at 75 per cent. is a stipulation by way of penalty, one has to take into consideration all the facts of the case. In this case it is found that the loan was intended as a merely temporary loan,—intended to be repaid in two months. We know it had to be raised by the defendants who were men in poor circumstances,—all of them, with one possible exception, were ignorant men—for the purpose of providing *begar* transport coolies for the Lushai expedition. Rs. 200 was the total amount of loan and a considerable amount of land, according to the finding of the District Judge, was mortgaged to secure this loan. As I read his judgment the land was considerably in excess of, the principal sum of Rs. 200 or any possible interest which could become recoverable within the space of two months or within any reasonable time: and, therefore, when I consider all these facts, can I say that the borrowers under these circumstances having agreed to pay interest at 75 per cent. were

(1) (1914) I. L. R. 42 Cal, 652; 21 C. L. J. 79.
(2) (1912) A. C. 394.

doing anything but agreeing to pay a *penalty*. In my opinion, there can only be one answer. The District Judge said, "the plaintiff's claim is certainly one that shocks the conscience :" The learned Judge of the High Court said that in his view the rate of interest was '*exorbitant*,' and in that view he did not allow the plaintiff any costs.

In my opinion under the circumstances of this case the agreement to pay interest at 75 per cent. was a stipulation by way of penalty. But I wish to make it quite clear that I am deciding that this agreement is a stipulation by way of penalty having regard to the circumstances of this case and this case only, because it may well be that in other cases 75 per cent. is a perfectly proper rate, or at any rate, it may not be a stipulation by way of penalty.

As I have said, I think under the circumstances of this case the insertion of the provision as to the rate of interest was a stipulation by way of penalty. Therefore, we have to consider what is reasonable compensation within the meaning of section 74.

I think that the rate of interest which was allowed by the District Judge at 15 per cent. ought not to be disturbed. I should require further information to satisfy me that the decision of the gentleman who was acting as the District Judge sitting in the district and who knew the local conditions and heard all the evidence should be interfered with. I think he was eminently the right person to decide such a question. I therefore confirm his judgment that 15 per cent. would be the reasonable compensation. The result of that will be that a further account will have to be taken, unless the parties can agree, as to the amount, for this reason : as I understand, the learned Judge of the first appellate Court directed an account to be taken upon the basis that there was a verbal agreement, each individual mortgagor being liable to pay one-sixth of the principal and interest thereon : but I have come to the conclusion that evidence as to that verbal agreement ought not to be admitted and the only contract between the parties is the written mortgage bond and the defendants are liable to pay the full amount of the principal which is Rs. 200 and interest at the rate of 15 per cent. down to the institution of the suit. It may be that what the parties have already paid covers the amount which they are liable to pay on that basis ; on the other hand, it may be that what the parties have already paid does not cover the amount for which they are liable on that basis. It will depend upon the result of the account as to what will be the final form of the decree. The decree will be that the plaintiff is entitled to recover against the

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defendants jointly and severally $\frac{5}{8}$ths of the principal money, namely Rs. 200 and interest thereon at the rate of 15 per cent. per annum down to the date of the suit and from the date of the suit at 6 per cent. per annum until realization. The account will have to be taken, and if it turns out that the amount which the defendants have already paid was sufficient to cover the amount due upon the decree upon that basis, then the suit will be dismissed. On the other hand, if it turns out that amount already paid is not sufficient, then there will be a decree in favour of the plaintiff for the balance. The final decree will be drawn up by the Bench clerk upon this basis, who no doubt will have the assistance of the learned vakeels on both sides.

There is just one other matter which I ought to have mentioned. It was argued during the course of the case that inasmuch as the plaintiff had released one of the mortgagors, and had not at the same time expressly reserved his remedies against the other mortgagors, that in itself would release the other mortgagors. At one time I was impressed by that argument, because it coincided with the view which is held in England with regard to such position as that, and if this matter had to be decided by the law as it stands in England at the present moment, that might have raised considerable difficulty in the way of the plaintiff; but my attention having been drawn to section 44 of the Contract Act which apparently was expressly inserted for the purpose of modifying the law as it stands in England, I do not think that point is a good one.

As regards costs, I think that the appellants in this Court should have the costs of this appeal. With regard to the proceedings before Mr. Justice Teunon, each party will pay his own costs. With regard to the proceedings before the first appellate Court and the Court of first instance, they will depend upon the result of the account, and the costs will be in proportion to the success of each party, and if the suit on such account being taken be dismissed, it will be dismissed with costs in those Courts.

Liberty to apply.

Mookerjee, J.—I agree that the judgment of Mr. Justice Teunon now under appeal cannot be supported.

The plaintiffs respondents instituted this suit on the 28th January 1909 to enforce a mortgage granted by six persons in favour of their predecessor on the 21st December 1897, to secure an advance of Rs. 200 on interest at the rate of 75 per cent. per annum. The plaint stated that Rs. 443 had been paid towards the satisfaction of the debt and that Rs. 1419-8-0 was still due. The plaintiffs,

accordingly, prayed that the mortgaged premises might be sold for realization of this sum.

The Court of first instance found that the plaintiffs had released one of the six mortgagors on receipt of a proportionate share of the mortgage money together with interest, but that they had not given full credit for the payments made by the other mortgagors. The result was that a decree was made in favour of the plaintiffs for Rs. 1,307 to be realized by sale of that portion of the mortgaged premises which had not been released. The defendants appealed against this decree.

The District Judge held, in the first place, that there was evidence to show that the mortgage contract had been split up by agreement of all parties concerned and that the mortgagees had undertaken to receive from each of the mortgagors a proportionate amount of the mortgage money and to release the corresponding share of the mortgaged properties. He held, in the second place, that interest was not justly recoverable at the rate of 75 per cent. per annum and that interest should be allowed only at the reduced rate of 15 per cent. per annum. Accounts were then taken on the basis described; and it transpired that the several mortgagors had paid up their respective shares of the mortgage money with interest. Consequently the ultimate decree of the District Judge was that the suit be dismissed.

The plaintiffs thereupon appealed to this Court and valued their appeal at Rs. 774-13-7 although a decree had been made in their favour by the trial Court for a much larger sum. In support of the appeal, which was heard by Mr. Justice Teunon, the plaintiffs argued, *first*, that oral evidence was not admissible, in view of the provisions of section 92 of the Indian Evidence Act, to prove that the mortgage contract had been varied in the manner alleged, and *secondly*, that interest was recoverable at the contract rate of 75 per cent. per annum. Mr. Justice Teunon accepted these contentions and made a decree in favour of the plaintiffs limited to the amount claimed in the appeal. He came to the conclusion, however, that the rate of interest specified in the bond was exorbitant and he consequently deprived the successful plaintiffs of their costs, as also of interest on the decretal sum after the date specified for redemption.

On the present appeal, which has been preferred under clause 15 of the Letters Patent, two objections have been urged on behalf of the defendants, namely, *first*, that interest is not payable at the rate specified in the bond, because the stipulation for payment of interest must be deemed a stipulation by way of penalty within the

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meaning of section 74 of the Indian Contract Act, and, *secondly*, that whatever decree, if any, is awarded to the plaintiffs, it should be a decree not jointly against the defendants for the entire sum found due, but severally against each of the mortgagors for a specified proportionate sum.

As regards the first contention, I am of opinion that the appellants have established their position. I base my conclusion on the ground that in the circumstances of this case the stipulation for payment of interest at 75 per cent. per annum was a stipulation by way of *penalty* within the meaning of section 74 of the Indian Contract Act. The District Judge has found, and his finding must be deemed conclusive by this Court, that the borrowers were ignorant Cachari cultivators, that they had been called upon to supply without remuneration transport coolies for the Lushai expedition which they were bound by the Regulation to supply, and that for the wages of the coolies they had to resort to a money-lender. The plaintiffs advanced the money, and notwithstanding the fact that ample security was furnished by the borrowers, they charged interest at the rate of 75 per cent. per annum although that was the rate of interest usual only in cases of unsecured loans. The District Judge has held in these circumstances that the covenant for payment of interest at such a high rate as 75 per cent. per annum was a stipulation by way of penalty and that award of interest at the rate of 15 per cent. per annum would meet the justice of the case.

On behalf of the plaintiffs respondents, the position has been maintained that the stipulation was not by way of penalty, inasmuch as the bond did not contain alternative provisions for payment of interest in different contingencies. The contention of the respondents in substance is that a stipulation for payment of interest cannot be deemed a stipulation by way of penalty, if the bond provides for payment of interest at one rate only, howsoever high and exorbitant that rate may be, and on this ground the decision in *Khagaram Das* v. *Ram Sankar Das Pramanik* (1) has been sought to be distinguished. No doubt, in that case the bond provided for payment of interest at alternative rates in varying circumstances; that, however, was not the reason for the conclusion adopted in that case. Upon a review of the earlier decisions in this Court and in the other High Courts, the principle was adopted that a Court is competent to grant relief whenever the rate of interest appears to the Court to be penal, although the provision for payment

(1) (1914) I. L. R. 42 Calc. 652; 21 C. L. J. 79.

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of interest mentions one rate only. This doctrine was recently applied in the case of *Bouwang Raja Challaphroo* v. *Banga Behari Sen* (1). Reference has been made in the course of the argument to another decision, *Abdul Majeed* v. *Khirode Chandra Pal* (2), which also apparently supports the contention of the appellants. With regard to that decision, however, I wish to guard myself against a possible inference that I accept all the propositions formulated in the judgment in that case; it appears to me that some of the statements therein may be open to just criticisms. But I adhere to the view which, after much deliberation and with the concurrence of Mr. Justice Beachcroft, I took in the case of *Khagaram Das* v. *Ram Sankar Das Pramanik* (3), and followed in *Bouwang Raja Challaphroo* v. *Banga Behari Sen* (1) with the concurrence of Mr. Justice N. R. Chatterjea and in *Gopeswar* v. *Jadab Chandra* (4), with the concurrence of Mr. Justice Newbould, namely, that it is competent to a Court to grant relief whenever the stipulation for payment of interest at a specified rate appears to the Court to be a stipulation by way of penalty.

The respondents have invited the Court to define what may be deemed a stipulation by way of penalty. I do not think we should accede to this request. It would clearly be wrong for the Court to lay down a rigid definition and thereby to crystalise the law, when the legislature, for the best of reasons, has not defined that expression. What constitutes a stipulation by way of penalty must be determined in each individual case upon its own special circumstances: and, in the circumstances of this case, I hold without hesitation that the stipulation for payment of interest at the rate of 75 per cent. per annum was a stipulation by way of penalty. If, consequently, the agreement for payment of interest is not enforcible, as I hold it is not, the plaintiffs are entirely in the hands of the Court; and I accept the view of the District Judge that 15 per cent. per annum is the proper rate in this case. The first point must consequently succeed.

As regards the second contention, it is clear that, in view of the provisions of section 92 of the Indian Evidence Act, oral evidence was not admissible to prove the alleged agreement between the

(1) (1915) 22 C. L. J. 311.
(2) (1914) I. L. R. 42 Calc. 690.
(3) (1914) 21 C. L. J. 79; I. L. R. 42 Calc. 652; 19 C. W. N. 775.
(4) (1915) 22 C. L. J. 352; 20 C. W. N. 689.

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mortgagees and mortgagors, whereby, it is said, the mortgage contract was split up. The essence of the matter is that the entire mortgage contract must, under section 59 of the Transfer of Property Act, be comprised in one or more written and registered instruments. We have here a written and registered instrument by which the original security was granted. Under the contract embodied there, the mortgagees are entitled to hold the mortgagors jointly and severally liable for the entire mortgage debt. A variation in that contract to the effect that each mortgagor is liable only in respect of a proportionate share of the debt, could be effected only by another written and registered instrument, so that the entire mortgage contract would thereafter be found in two instead of in one document: [Cf. the decision of the Full Bench in *Lalit Mohan Ghose* v. *Gopali Chauk Coal Co.* (1)]. If we were to accede to the contention of the appellants, the salutary provisions of section 92 of the Indian Evidence Act could be easily evaded and completely nullified. When the difficulty of the situation was realized by the appellants, the contention was, as a last resort, faintly put forward that the defendants might invoke the assistance of the doctrine that as one of the mortgagors has been released, the entire mortgage contract has been thereby split up. But it is plain that the appellants are not entitled to rely on this position which is inconsistent with their original case. Their primary case was that the mortgage contract had been split up by agreement of all the parties concerned, namely, the mortgagees and the mortgagors. Oral evidence, it has been held, is not admissible in proof of the alleged agreement. The defendants cannot now turn round and set up the inconsistent case that the mortgage contract has been split up, because one of the mortgagors has been released by the mortgagees without the consent of the other mortgagors. In this view, it is unnecessary to consider the application of the principle enunciated in *Hakim Lal* v. *Ram Lal* (2), and *Debendra* v. *Abdul Samed* (3). Consequently, the decree in this case must be a joint decree in favour of the plaintiffs, for such sum, if any, as may be found due upon the mortgage accounts, against all the defendants (other than the mortgagor who has been released).

A. T. M. *Appeal allowed: Decree varied.*

(1) (1911) 14 C. L. J. 411 F. B.; I. L. R. 39 Calc. 284; 16 C. W. N. 55.
(2) (1907) 6 C. L. J. 46. (3) (1909) 10 C. L. J. 150.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

SURENDRA LAL CHAUDHURI

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

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August, 15, 29.

Liability for loss—Railway administration—Insurer—Indian Railways Act (IX of 1890), Sec. 72, Sub-sec. (1)—Goods not delivered to the consignee—Burden of proof—Negligence—Extraordinary cause.

The liability of the railway administration for the loss or destruction of goods delivered to the administration to be carried by railway is measured solely by the test formulated in sections 151 and 152 of the Indian Contract Act.

When goods have not been delivered to the consignee at the place of destination, the plaintiff need not prove how the loss occurred ; the burden lies upon the bailee to prove the existence of circumstances which exonerate him from liability for the loss.

Trustees of the Madras Harbour v. *Best & Co.* (1) ; and *Sesham Patter* v. *Moss* (2) referred to.

A railway administration, when it accepts goods for transmission, is not in the position of an insurer.

Where the negligence of a person concurs with some *ordinary* cause and the conjunction produces an effect injurious to some other person, the operation of such an *ordinary* cause extraneous to the negligent person, will not excuse his liability for the whole of the joint effect. But where an extraordinary cause is the primary means of setting in motion an injurious agency and by co-operating with the negligence of a person produces injury to some other person, the negligent person is not liable.

Appeals by the Plaintiff.

Suit for recovery of value of goods made over to a railway administration for transmission but not delivered at the destination.

The material facts and arguments appear from the judgment.

Mr. C. R. Das and *Babu Probodh Chandra Roy* for the Appellant.

Babu Ram Charan Mitra for the Respondent.

The judgment of the Court was delivered by

C. A. V.

* Appeals from original Decrees Nos. 28 and 125 of 1912, against the decision of Babu Durga Das Bose, Subordinate Judge of 24 Perganas, dated the 20th September, 1911.

(1) (1899) I. L. R. 22 Mad. 524. (2) (1893) I. L. R. 17 Mad. 445.

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Surendra
v.
Secretary of State
for India in Council.

August, 29.

Mookerjee, J.—This is an appeal by the plaintiff in a suit for the recovery of value of goods made over to a railway administration for transmission but not delivered at the destination. The case for the plaintiff is that the Secretary of State for India in Council owns the Eastern Bengal State railway, that on the 12th October, 1909, the plaintiff made over to the railway authorities at Rungpore 250 bundles of tobacco worth Rs. 15,335 for despatch and carriage to Calcutta, but that the goods have never been delivered to him. The defendant pleaded in substance that the goods were destroyed while in course of transmission on the 17th October, 1909, by an act of God, namely, a severe cyclone, and that he is, consequently, not liable for the value of the goods. The Subordinate Judge has held that the loss of the goods was caused by an act of God beyond the control of the defendant, and that this furnishes a complete answer to the claim. The plaintiff has now appealed to this Court, and has invited us to hold that the decree of the Subordinate Judge is contrary to law.

The evidence shows that the goods were received by the railway authorities at Rungpore on the 12th October, 1909, and were, in ordinary course of business, loaded into wagons on that very day. They were despatched from Rungpore on the 14th October by a Goods Train that runs from Lalmanir Hat through Rungpore to Parbatipore. They could not be despatched on the 13th October, as there were goods received earlier, which were despatched on that date, as also a fish-van and two foreign empty wagons. The Station Master explains that preference is given in ordinary course of business to empty wagons which are the property of foreign railways and have to be speedily returned to them, as also to vans which contain perishable goods. There was consequently no unusual delay or unnecessary detention of the goods at Rungpore. The train reached Parbatipore in the evening of the 14th October in due course. The evidence shows that Parbatipore is a junction station where several lines of railway meet, and that the trains from the several lines are dissolved, re-marshalled and made into new trains. This was done in the present instance in the usual course of business in the way described by the trains clerk at Parbatipore, who has been examined as a witness. The goods were sent on by a train which left Parbatipore on the morning of the 15th October. They could not be sent earlier, as precedence had to be given to wagons previously received. The train arrived at Sara at about 8 o'clock in the evening of the 15th October, and the wagons were made over to the transhipment department on the

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morning of the 16th October; (the order for transfer was actually made on the evening of the 15th October, immediately after the arrival of the train at Sara), Sara, it may be stated, is on the bank of the river Padma, and here goods have to be carried across the river in flats to the station on the Calcutta side, named, Goolbatham. The goods were loaded into one of the flats on the 16th October along with a considerable quantity of other goods brought down by various trains. On the 17th October, the steamer which carried the flats, left Sara and reached Goolbatham late in the afternoon. The flats were not unloaded that day, and the goods remained thereon. A severe cyclone passed over the locality in the evening and the result was that the steamer and the flats sank in the river. The question arises, whether, in these circumstances, the railway authorities can be called upon to make good the loss sustained by the plaintiff.

Sub-section (1) of section 72 of the Indian Railways Act, 1890—we quote only so much of the section as is applicable to this case—provides that the responsibility of a railway administration for the loss or destruction of goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under sections 152 and 161 of the Indian Contract Act, 1872. Section 152 of the Indian Contract Act provides that the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151, that is, as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. Section 161 of the Indian Contract Act provides that if, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. It is worthy of note that section 72 of the Indian Railways Act, 1890, effects a substantial alteration in the law as contained in section 10 of the Indian Railways Act, 1879. It is further worthy of note that section 2 of Act IX of 1890 repeals sections 7 and 10 of the Carriers Act (III of 1865). As Lord Macnaghten pointed out in *Irrawaddy Flotilla Co.* v. *Bhugwandas* (1), the Act of 1890 reduces the responsibility of carriers by railway to that of bailee under the Contract Act, 1872; it also declares in section 72 (3), that nothing in the Common Law of England or in the Carriers Act, 1865 regarding

(1) (1891) I. L. R. 18 Calc. 620; L. R. 18 I. A. 121.

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the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility of a railway administration as defined in the section. The object of the legislature, when Act IX of 1890 was enacted, was obviously to depart from the law as enunciated by this Court in *Moothura Kant* v. *I. G. S. N. Co.* (1), subsequently approved in *Chogemul* v. *Commissioners for the Improvement of the Port of Calcutta* (2) and *Irrawaddy Flotilla Co.* v. *Bhugwandas* (3) in cases of liability under the Indian Railways Act, 1879. It is plain that, in the case before us, the liability of the defendant must be measured solely by the test formulated in sections 151 and 152 of the Indian Contract Act. This view accords with the decisions in *Sesham Patter* v. *Moss* (4), *Lakhmichand* v. *G. I. P. Ry. Co.* (5) and *Hirji* v. *B. B. C. I. Ry. Co* (6). It is also clear that when goods have not been delivered to the consignee at the place of destination, the plaintiff need not prove how the loss occurred; the burden lies upon the bailee to prove the existence of circumstances which exonerate him from liability for the loss: *Trustees of the Harbour, Madras* v. *Best & Co.* (7); *Sesham Patter* v. *Moss* (4). In our opinion, the defendant has discharged this burden. The railway authorities acted at every step in the ordinary course of business; they took as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods, of the same bulk, quality and value as the goods bailed. There was no unusual or unnecessary delay or detention in course of transit; the case for the plaintiff was put before the Court on the hypothesis that whenever goods are delivered to a railway administration for transmission, they must be despatched by the very next train available and if the goods have to be carried over several lines or across rivers, they must have precedence at every stage; and this must be done regardless of other demands on the railway. If the theory, which underlies this assumption, were to prevail, it would be manifestly impossible to run a railway on business lines. We feel no doubt that in the present case there was no negligence whatever on the part of the railway authorities and whatever took place, was done in the usual course of business.

It has finally been argued that a railway administration, when it accepts goods for transmission is, in the position of insurers as

(1) (1883) I. L. R. 10 Calc. 166. (2) (1891) I. L. R. 18 Calc. 427.
(3) (1891) I. L. R. 18 Calc. 620 P. C. (4) (1893) I. L. R. 17 Mad. 445.
(5) (1911) I. L. R. 37 Bom. 1.
(6) (1914) I. L. R. 39 Bom. 191; 16 Bom. L. R. 467.
(7) (1899) I. L. R. 22 Mad. 524.

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common carriers. There is no foundation for this contention. Even under the Common Law of England, a common carrier is not responsible for the consequences of an act of God. It is sufficient to refer to the celebrated judgment of Holt, C.J. in *Coggs* v. *Bernard* (1), where, with reference to bailees who exercise a public employment for a reward, he makes the following observation: "The law charges this person, thus entrusted, to carry goods against all events but acts of God and of the enemies of the king": *Nugent* v. *Smith* (2); *Lloyd* v. *Guibert* (3). Even upon this view, the claim is unfounded. We may add that even if it was established that there was avoidable delay in the transmission of the goods, it is at least doubtful whether the plaintiff would have any remedy against the defendant. Assume that the conduct of the defendant has been negligent within the definition formulated by Baron Alderson in *Blyth* v. *Birmingham Water Works Co.* (4): "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Still, the question arises, whether the act of God is not the proximate cause of the loss and the alleged lack of diligence of the defendant nothing more than the remote cause. Beven in his work on Negligence [(1908) Vol. I, P. 81] states the law in the following terms. "Where the negligence of a person concurs with some *ordinary* cause and the conjunction produces an effect injurious to some other person, the operation of such an *ordinary* cause extraneous to the negligent person will not excuse his liability for the whole of the joint effect. The law is otherwise, where an *extraordinary* cause is the primary means of setting in motion an injurious agency and by co-operating with the negligence of a person produces injury to some other person. In this case the negligent person is not liable; for not only would his negligence alone fail to produce the injurious effect (this circumstance, however, is common to the two cases, and notwithstanding this, in the former, there is no immunity from liability), but the exciting cause being an *extraordinary* occurrence or an act of God, was not reasonably to be anticipated nor guarded against. *The negligent act is not followed by injurious results in natural and probable sequence, but only by the occurrence of something abnormal*

(1) (1703) 2 Ld. Raymond 999; 1 Sm. L. C. (1915) 191 (203).
(2) (1876) 1 C. P. D. 423.
(3) (1865) L. R. 1 Q. B. 115 (121).
(4) (1856) 11 Ex. 784; 105 R. R. 794.

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and not to be anticipated." This exposition of the law receives support from the unanimous judgment of the Supreme Court of the United States in *Memphis Rail Road Co.* v. *Reeves* (1), where the facts were very similar to those of the case before us. The goods (tobacco) were delivered to a railway company for transmission, there was delay in transit which was not satisfactorily explained; while in transit, the goods were destroyed by a sudden violent and extraordinary flood and storm. It was proved that but for the delay in the course of transit, the goods would have escaped the flood. The Court ruled that the railway company was not liable and added that the flood was the proximate cause of the injury and the delay in transportation the remote one. It was also observed that although there was some divergence of judicial opinion on the subject in the Courts of the various states, the balance of authority and reason was on the side of the conclusion unanimously accepted by the Supreme Court of the United States. It follows that from whatever point of view the present case is examined the claim cannot be sustained.

The result is that the appeal is dismissed with costs. It is conceded that this judgment will govern the other appeal which also is accordingly dismissed with costs.

A. T. M. *Appeals dismissed.*

(1) (1869) 10 Wallace 176.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

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ALIMUDDIN MEA AND OTHERS.*

Evidence, admissibility of—Compromise, offer of—Evidence Act (I of 1872), Secs. 18, 23—Admission by one defendant, if and when receivable in evidence against another—Contract.

In the absence of any express or strictly implied restriction as to confidence, an offer of compromise is admissible, and may be material as some evidence of

* Letters Patent Appeal No. 79 of 1913, against the decision of Mr. Justice Chapman, dated the 11th March, 1913, in Appeal from Appellate Decree No. 357 of 1911, against the decree of G. N. Roy Esq., officiating Additional District Judge of Dacca, dated the 25th July 1910, affirming that of Babu Kumud Kanta Sen, Munsiff of Munshigunge, dated the 19th March, 1910.

liability, although it may not be proper to enquire into the exact terms offered, as such an offer might have been made for the sake of purchasing peace and without any intention to admit liability to the extent of the claim.

When several persons are jointly interested in the subject matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.

Per Sanderson C. J.: The mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted, is not in itself sufficient to prevent the conversation from being put in evidence.

Per Mookerjee J: In cases of contracts where one of the contracting parties dies, the right or obligation under the contract passes to his representatives as one entire juristic person.

Ahinsa Bibi v. *Abdul Kader* (1) referred to.

Appeal by the Plaintiff.

Suit for rent.

The defence was payment of rent. The Court below decreed the suit. The defendants appealed to the High Court. Mr. Justice Chapman remanded the case for reconsideration on the ground that the decision of the learned District Judge was based on evidence inadmissible in law, by the following judgment :

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Chapman, J.—The question in this case was whether the rent sued for had been paid or not. The learned District Judge says the determining factor in the case is the evidence of the plaintiff's pleader, and that evidence was to the effect that one of the defendants had approached him at the time when the suit was filed and subsequently for the purpose of compromise. Now the Courts below have not considered the application of section 23 of the Evidence Act, it seems to me quite clear having regard to the time when this offer of compromise was made that it was made on the understanding that evidence of it would not be given in the case. The evidence was inadmissible, moreover the evidence referred to only proved an admission by defendant No. 2 and his admission is no evidence against the other defendants in the case.

The judgment and decree of the learned District Judge is set aside and the case is remanded for decision upon the evidence after leaving out of consideration the evidence given by the plaintiff's pleader.

The costs will abide the result.

Against this decision the plaintiff preferred an appeal under section 15 of the Letters Patent.

(1) (1901) I. L. R. 25 Mad. 26.

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Babus Jogesh Chunder Roy and *Prokash Chunder Mojumdar* for the Appellant.

Babu Rajendra Chandra Guha for the Respondents.

The following judgments were delivered :

Sanderson C. J.—This is an appeal from the judgment of Mr. Justice Chapman by which he set aside the judgment of the officiating Additional District Judge of Dacca whereby he affirmed the judgment of the learned Munsiff.

The action was brought for rent by the plaintiff, and the defence was that the rent had in fact been paid. The learned Munsiff found that it had not been paid.

The learned Officiating District Judge investigated the facts and came to the conclusion, as the learned Munsiff did, that the rent had not in fact been paid; and, he said in his judgment, "The learned Munsiff has disbelieved the witnesses to payment for cogent reasons and these have not been met." Then after making a few other observations he goes on to say, "The determining factor in the case is the evidence of the plantiff's pleader. He deposes that defendant No. 2 came to him before the suit and asked him to make a settlement:" and, on reference to the evidence it appears that the interview to which the learned District Judge was referring was about a month before the suit was instituted :—"The form of settlement was suggested, *viz*, diminution of interest; on the day the suit was filed defendant No. 2 again came with a relation and asked the pleader not to file the deficit Court-fee stamps but to make a compromise" Now, the learned Judge who has allowed the appeal from the District Judge came to the conclusion that this evidence of the plaintiff's pleader ought not to have been admitted ; and the learned vakil for the defendants has supported his judgment upon this ground: He says, that reference must be made to section 23 of the Indian Evidence Act, which runs in this way, "In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." Now, it is admitted by the learned vakil for the defendants that this case does not come within the first branch of that section ; or, in other words, he agrees that there was no express condition that the evidence of this conversation or interview should not be given: But he says that it does come within the second branch of it, because he argues, that there were circumstances from which the Court could infer that the parties

agreed together that the evidence of it should not be given. The learned Judge, Mr. Justice Chapman, has taken that view, and he says, "That evidence was to the effect that one of the defendants had approached him at the time when the suit was filed and subsequently for the purpose of compromise." It is to be pointed out, first of all, that the learned Judge has somewhat misunderstood the evidence in the case, because the first interview between the defendant No. 2 and the plaintiff's pleader was at least a month before the suit was instituted, and was not at the time when the suit was filed as the learned Judge says it was: We have to see whether there are any circumstances in this case from which we can infer that there was an understanding between the plaintiff's pleader and the defendant No. 2 that the conversation which they had about the settlement of this suit should not be given in evidence against the defendants. I did not see those circumstances, and I asked the learned vakil yesterday what they were: and, so far as I can make out from his argument, they were that inasmuch as there was a suit about to be instituted, and inasmuch as this conversation was about a compromise of the claim, it must be inferred that it was intended by the parties that that conversation should be a *privileged* conversation or should be a conversation *without prejudice*. I do not think that the mere fact that it was contemplated between the parties that the suit was about to be instituted prevents the conversation as regards a settlement of the claim from being given in evidence.

My opinion is supported by the case to which my attention was drawn by my learned brother Mr. Justice Mookerjee, and which was decided so long ago as 1830 by Chief Justice Lord Tenterden, in *Wallace* v. *Small* (1). There 'the action was upon an *assumpsit* on a charter party: There was some difficulty in fixing the defendant with the contract.' It appeared, however, that after the action was brought—I draw attention to that because the conversation in the present case was at least a month before the action was brought, while in that case [*Wallace* v. *Small* (1)] it was after the action had been brought—an offer of a specific sum had been made; and evidence was given on the part of the plaintiffs that a friend of theirs in consequence went to the defendants and advised them to increase their offer, and that the defendants refused to do so saying, 'we shall lose enough by the charter party as it is.' The witness stated that nothing was said about this communication being without prejudice. The Attorney-General for the defendants,

(1) (1830) Moody and Malkin's Reports, 446.

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argued that the evidence was inadmissible. And, he said that "upon the very nature of the transaction it appears to have been a negotiation for a compromise,"—the very argument which the learned vakeel put forward in this case—"and if so, it must be understood to be without prejudice, although nothing is said on that subject at the time; nor does it, even if admitted, amount to any proof of liability." There the learned Chief Justice said that the evidence ought to be admitted; and, he also said he thought it good *prima facie* evidence of liability. He said "it is not said to be without prejudice, and an offer to compromise may be very well made, *without* any restriction as to confidence" That is entirely in accordance with *my* judgment, and not only that, but with my experience. The mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted, is not in itself sufficient to prevent the conversation from being put in evidence. That really disposes of the first conversation. I ought to mention in connection with that, that when the case was being tried in the Court of first instance, no objection was taken by those who were appearing on behalf of the defendants to the conversation which took place a month before the institution of the suit, being given in evidence: That of course is not conclusive, but it is some evidence at least that the parties themselves did not regard that conversation as being a privileged conversation.

Then it is said that the second conversation which took place about the time of the filing of the suit is privileged. It is quite true that objection was taken to that being given in evidence, in the first Court. But it seems to me that the second conversation was a natural consequence of the first conversation which took place a month before. As I understand, it only amounted to this, that the defendant must have obtained information that the suit was filed and that the deficit court-fee had not yet been paid, and he and a relation went to the plaintiff's pleader, and in fact asked for time in order to see whether the suit might not be compromised. Having formed the opinion, as I have said before, that the second conversation followed as a natural consequence of the first, and that the first conversation was not privileged, I do not think that any difference can be drawn between the first and the second conversation, as to their being admissible in evidence.

A subsidiary point was taken by the learned vakeel on behalf of the defendants that the learned District Judge had misunderstood the effect of the evidence as to the second conversation, namely, that the learned District Judge said that it was the defendant No. 2

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who took part in the conversation on the second occasion, whereas as a matter of fact it was the relation who went with him who made the offer of compromise. I really think that it is too small a point to require any serious conversation, because that was a conversation which took place in the presence of defendent No. 2 and it must be taken to have been made with his authority.

The other point upon which the learned vakeel relied was that even if the conversation was rightly admitted, it ought to have been admitted only as against the defendant No. 2 who is supposed to have made the admission. I think that the learned Judge did take it as being an admission against all the defendants, and therefore it is necessary to consider whether the admission made by the defendant No. 2 can be taken in evidence against all the defendants. In my judgment, it can. The question depends upon section 18 of the Indian Evidence Act which runs in these terms, "Statements made by a party to the proceeding or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them are admissions." Here again there is no express authorization of the defendant No. 2 to make these admissions. If these admissions are to be taken against all the defendants they must come within the implied authority by the other defendants to him. Now, it was pointed out by Sir Richard Garth, when he was the Chief Justice of this Court, in the case of *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi* (1), that this section which I have just read is a concise statement of the law which was, I think, correctly laid down in Mr. Taylor's Book on Evidence; because the learned Chief Justice says at page 590, "Where there are several co-contractors or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held admissible as evidence as against the others." Then, he refers to the passage in Taylor on Evidence, Volume I, 1st edition, p. 489, section 525, (which is now section 543):—"Where several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered." Then he further says, "The principle of this rule is, that for the purpose of

(1) (1885) I. L. R. 11 Calc. 588.

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making these statements with reference to the joint concern or common subject of interest one partner or co-contractor is considered to be the agent of the others; and this rule, as I take it, is enacted, though in a somewhat concise form in section 18 of the Indian Evidence Act." In my judgment the defendants in this case can be looked upon as co-contractors as they were joint tenants of the plaintiffs. In one sense they may be looked upon as partners. When one of those contractors or partners comes to the plaintiff's pleader for the purpose of seeing whether he cannot settle the action which was brought by the plaintiff against all the defendants, it seems to me that he must be implied to have authority to act on behalf of all the defendants. For these reasons I think the evidence was rightly admitted, not only as against the defendant No. 2 but as against all the defendants: and, consequently, that evidence having been rightly admitted I think the learned Judge Mr. Justice Chapman was wrong and that this appeal ought to be allowed. The result of that is that the judgment of the District Judge is restored. The defendants will have the costs both in this appeal and the appeal before Mr. Justice Chapman.

Mookerjee, J.—I am of opinion that upon each of the two questions of law involved in this appeal, the rule has been too broadly formulated by Mr. Justice Chapman; and that if the principles applicable are duly qualified, his judgment cannot possibly be sustained.

The plaintiff brought this suit against the defendants for recovery of arrears of rent due under a lease executed in favour of their father on the 3rd February, 1897. The substantial defence was a plea of payment. This plea was overruled concurrently by both the Courts below. Upon appeal to this Court Mr. Justice Chapman has reversed the decision of the District Judge and has remanded the case for reconsideration on the ground that the decision of the District Judge was based on evidence inadmissible in law.

The evidence to which exception is taken is that of the pleader for the plaintiff, who deposed that the second defendant had come to him before the institution of the suit and had asked him to arrange for a settlement by way of remission of interest. The District Judge held that this request for remission of interest was an indirect admission that the whole of the amount claimed was due; in other words, that the plea of payment was untrue. On behalf of the defendants, it was argued before Mr. Justice Chapman, *first* that evidence was not admissible to prove that the defendant had proposed a settlement and had thereby indirectly admitted the claim;

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and, *secondly*, that even if the admission was held admissible as against the second defendant, it could not be used as against the other defendants. Mr. Justice Chapman has given effect to both these contentions.

As regards the first objection, Mr. Justice Chapman observes that the Courts below did not consider the application of section 23 of the Indian Evidence Act and that it was quite clear that having regard to the time when the offer of compromise was made, it was made on the understanding that evidence of it would not be given in the case. Now, section 23 provides that "In civil case, no admission is relevant, if it is made either upon an express conditon that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." It is not disputed that in the case before us, there was no such express condition. Consequently, the defendants can rely only on that portion of section 23 which provides for the exclusion of an admission made under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. The judgment of Mr. Justice Chapman does not specify the circumstances from which, in the present case, this inference could be drawn. Apparently he assumed that because an offer of compromise was made, there was necessarily an implied understanding that evidence of it would not be given in the case. This view is, supported to some extent by the observation of Mr. Justice Phear in the case of *Mohabeer Singh* v. *Dhujjoo Singh* (1) where the following statement will be found: "It is a rule which all Courts of justice find it right to observe that nothing which passes between the parties to a suit in any attempt at arbitration or compromise, should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court; unless this were so the only thing which could be prudently recommended to suitors would be never to listen for one moment to any proposal to settle the matter, or to compromise it, after it had come into the Civil Court." This proposition was enunciated in respect of a case not governed by the provisions of the Indian Evidence Act, 1872. It is consequently not necessary for me to consider whether the statement was a correct exposition of the law as it stood before 1872. But, in my opinion, the rule enunciated in the judgment mentioned is expressed too broadly, in view of the provisions of section 23 of the Indian Evidence Act. An offer of compromise, the essence whereof is that the party making

(1) (1873) 20 W. R. 172.

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it is willing to submit to a sacrifice or to make a concession, is rejected, though nothing was expressly said at the time respecting its confidential character, only if it clearly appears to have been made on the faith of a pending treaty into which the party was led by the confidence of an arrangement being effected. In the absence, however, of any express or strongly implied restriction as to confidence, an offer of compromise is clearly admissible, and may be material as some evidence of liability, although, as has been said, it may not be proper to enquire into the exact terms offered, as such an offer might have been made for the sake of purchasing peace and without any intention to admit liability to the extent of the claim. That this is the true rule is obvious from the decisions in *Wallace* v. *Small* (1); *Watts* v. *Lawson* (2); and *Nicholson* v. *Smith* (3). The rule is also well illustrated by the decision in *Harding* v. *Jones* (4) where the fact that the drawer of a bill, whose signature was in issue, had proposed a settlement, was used against him as his admission. Reference may in this connection be also made to the observations of Lord St. Leonards in *Jorden* v. *Money* (5) with reference to negotiations between an attorney on one side and the opposite party: "When an attorney goes to an adverse party with a view to a compromise, or to an action, you must always look with very great care at his evidence of what then occurred. There must be such a disposition in an attorney, who has brought an action, to maintain it, that it is always very desirable that the attorney should abstain as much as possible from talking to a person when he means afterwards to swear to the conversation, and upon that conversation to found a right which otherwise might not be found to exist." These observations would have been obviously superfluous if, as has been contended by the respondent in this case, all negotiations for settlement between the attorney on one side and the opposite party had been, by reason of a rigid and inflexible rule, always inadmissible in evidence. I hold accordingly that the evidence of the pleader for the plaintiff as to what had passed between him and the second defendant for the settlement of the case was admissible in evidence. This view is strengthened by the circumstance that no objection was taken in the trial Court to the reception of a portion at any rate of the statement made by the pleader.

As regards the second objection, Mr. Justice Chapman has

(1) (1830) Moody and Malkin 446.
(2) (1830) Moody and Malkin 447 (n)
(3) (1822) 3 Starkie 128.
(4) (1836) Tyrwhitt and Granger 135.
(5) (1854) 5 H. L. C. 185 (245).

held that the evidence of the pleader only proved an admission by the second defendant and that such admissision is no evidence against the other defendants. In support of this view, reference has been made on behalf of the respondents to the decision in *Kalikisore Chowdhury* v. *Gopi Mohan Roy Chowdhury* (1). In my opinion, the contention that an admission by one defendant is not receivable in evidence as against another defendant is too broadly formulated. The cases to which reference has been made on behalf of the appellant *viz*, *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi* (2) and *Chalho Singh* v. *Jhuro Singh* (3) show that under section 18 of the Indian Evidence Act, an admission by one defendant may, in certain circumstances, be admissible in evidence as against another defendant. The principle is that when several persons are jointly interested in the subject matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. Now, in the case before us, the defendants have been jointly sued as the representatives in interest of the original tenant. As was explained in *Ahinsa Bibi* v. *Abdul Kader Saheb* (4) in cases of contracts where one of the contracting parties dies, the right or obligation under the contract passes to his representatives as one entire juristic person. In the case before us, the defendants are jointly liable to the plaintiffs as the representatives in interest of their father, who was the original tenant and obtained the lease. We cannot consequently hold that the evidence is admissible as against the second defendant and not admissible as against the others. The result of the acceptance of the contrary view would be that as against the second defendant, the Court would have to hold that the plea of payment was untrue and that the plaintiff was entitled to a decree for the entire sum; while, as against the other defendants, the Court would be driven to the conclusion that the plea of payment was established, and that, so far as they were concerned, the plaintiff was not entitled to a decree for the whole sum. But it is perfectly clear that the only possible decree which can be made in the suit is a joint decree for the entire sum found payable by all the defendants jointly as representatives of the original tenant. In my opinion, it

(1) (1897) 2 C. W. N. 166. (2) (1885) I. L. R. 11 Calc. 588.
(3) (1911) I. L. R. 39 Calc. 995. (4) (1901) I. L. R. 25 Mad. 26.

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is plain, upon principle as also upon the authorities, that the admission was rightly used by the District Judge not merely against the second defendant but also against the other defendants.

On these grounds, I agree that the decree made by Mr. Justice Chapman must be reversed and that of the District Judge restored with costs.

A. T. M. *L. P. decreed: Appeal dismissed.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

DWIJENDRA NATH ROY CHAUDHURI AND ANOTHER

v.

AFTABUDDI SARDAR*

AND

NARENDRA NATH MITRA AND OTHERS

v.

DWIJENDRA NATH ROY CHAUDHURI AND ANOTHER.*

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August, 24, 25.

Rent, suspension of—Eviction of tenant, whether from part or whole—Tenancy, if terminated—Tenant, if excused from performance of his covenant—Eviction, what is—Actual physical expulsion by force, if necessary—Bengal Tenancy Act (VIII of 1885), Sec. 106—Proof, necessary—Burden of proof.

The eviction of the tenant, whether from part of the demised premises or from the whole, entails a suspension of the entire rent, while the eviction lasts, whether the tenant remains in possession of the residue or not; the tenancy, however, is not thereby terminated, nor is the tenant discharged from the performance of his covenants other than fragment of the rent, such as a covenant to repair.

Hodgskin v. *Queenborough* (1); *Pellat* v. *Boosey* (2); *Morrison* v. *Chadwick* (3) and *Newton* v. *Allin* (4) referred to.

To constitute an eviction, it is not necessary that there should be an actual physical expulsion by force or violence from any part of the premises; any act of a permanent character done by the landlord or his agent with the intention of depriving the tenant of the enjoyment of the demised premises or any part thereof operates as an eviction.

Upton v. *Townend* (5); *Henderson* v. *Mears* (6) and *Baynton* v. *Morgan* (7) referred to.

In a suit under section 106 of the Bengal Tenancy Act, the plaintiff is not entitled to a declaration that a specific entry in the record of rights is not correct as it stands; he must go further and establish, in what respect it is incorrect and how it should be amended; if he is unable to do this, his suit must fail.

* Appeals from Appellate Decrees Nos. 1211 and 2007 to 2037 of 1913 and 1318 to 1384 of 1914, against the decrees of Babu Jogendra Nath Bose, Subordinate Judge of Khulna, dated 2nd December, 1912, affirming, modifying or reversing those of Babu Sachidananda Mookerjee, Munsiff of Satkhira, dated 2nd March, 1911.

(1) (1738) Willes 129.
(2) (1862) 31 L. J. C. P. 281; 8 Jur. N. S. 1107; 136 R. R. 862.
(3) (1849) 7 C. B. 266; 78 R. R. 627.
(4) (1841) 1 Q. B. 518.
(5) (1855) 17 C. B. 30; 104 R. R. 562.
(6) (1859) 28 L. J. Q. B. 305; 7 W. R. (Eng.) 554.
(7) (1888) 22 Q. B. D. 74.

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Appeals by the Plaintiffs in the first group and by the Defendants in the second group.

The plaintiffs sought relief in respect of alleged omissions made by the settlement officer in the record of rights finally published. Other facts appear sufficiently from the judgment.

Babus Dwarka Nath Chuckerbutty, *Girija Prasanna Roy Chowdhury* and *Bhudhar Haldar* for the Appellants in the 1st group and for the Respondents in the 2nd group.

Sir S. P. Sinha, *Babus Narendra Chandra Bose*, and *Satyendra Nath Mitra* for Respondent in the 1st group and for Appellants in the 2nd group.

Babu Biraj Mohan Majumdar for the Respondents in the 1st group.

The judgment of the Court was delivered by

August, 25.

Mookerjee, J.—These 99 appeals arise out of as many suits, instituted under section 106 of the Bengal Tenancy Act, originally before a revenue officer, but, under the first proviso to that section, subsequently transferred to the civil Court. The plaintiffs seek relief in respect of alleged omissions made by the settlement officer in the record of rights finally published on the 16th April, 1909.

The lands in dispute are comprised in *dihi* Bhadra, purgana Buran, an estate bearing towzi No. 132 on the revenue roll of the Collector of Khulna. The Mitters and the Lahas are each entitled to a four annas share in the estate. The remaining eight annas share was originally vested in the Roy Chowdhuries of Satkhira; the plaintiffs, who represent one branch of that family are now entitled to a three annas share, and, some of the defendants, who represent the other branch of the family, are entitled to the residue of five annas share. The grievance of the plaintiffs is that though they are thus admittedly a three annas share-holder in the lands, yet no rent has been entered in the record of rights as payable to them by the tenants.

The precise question in controversy may be illustrated by reference to the details in one case, represented by the entry No. 65 in the record of rights. The seventh column shows that the area in the occupation of the tenants is 20 bighas. The eighth column shows that the rent payable in respect of the land in the occupation of the tenant is Rs. 31-12-19 gundas. The twelfth column shows that the Lahas are entitled to receive, out of this sum, Rs. 9-12-12 gundas, the Mitters Rs. 9-12-12 and the Roy Chowdhuries, the co-sharers of the plaintiffs, Rs. 12-3-15 gandas. The plaintiffs seek a

declaration that the entries in the eighth and twelfth columns are erroneous, because incomplete and pray that they be amended in the manner following, namely, that in the eighth column the rent payable be shown, not as Rs. 31-12-19 but as Rs. 39-2-8 gds., and in the twelfth column, an additional entry be made to the effect that Rs. 7-5-9 gds. is payable as rent to the plaintiffs. It is worthy of note that the plaintiffs do not seek a declaration that the entry in the seventh column as to the area of the lands in the occupation of the tenants is erroneous.

The defendants resist the claim substantially on the ground that the predecessors of the plaintiffs had in or about the year 1853, dispossessed their co-sharers as also the predecessors of the tenants from the lands comprised in the various tenancies and had absorbed them in a garden known as Shibnagar Bagan. Their contention in essence is that the effect of this action on the part of the predecessors of the plaintiffs had been to suspend the rent, otherwise payable to them, and, that, in respect of the residue of the lands left in the occupation of the tenants, the rent is payable only to the 13 annas landlord, as recorded by the settlement officer.

The trial Court found this defence established in the case of all the tenancies and dismissed the suits. On appeal, the Subordinate Judge has confirmed the decrees in 32 suits; but in the other 67 suits, he has either varied or set aside the decrees of the primary Court. The result is that the plaintiffs have appealed against the concurrent decisions of the Courts below in 32 suits and the defendants have appealed in 67 suits where the decree of the Subordinate Judge modifies or reverses the decree of the trial Court. The judgments of the Courts below are not remarkable for lucidity, and this may be due to the circumstance that numerous suits were by consent of parties tried together. But we are of opinion that it is not difficult to determine what the Courts below have in essence found.

One important question in controversy in the Courts below was as to the effect of eviction by a landlord of a tenant from a part or whole of the land of his tenancy. In the primary Court, the view found acceptance that the effect of such eviction is to dissolve the relationship of landlord and tenant; and there are indications in the judgment of the Subordinate Judge that he possibly held that the eviction operated as adverse possession by the landlord against the tenant. In our opinion, there is no room for controversy that the tenancy is not terminated by eviction. If this view were not adopted, the result would follow that a landlord, by reason of the eviction itself (that is, his own wrongful act) would become forth-

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with entitled to treat the tenant as a trespasser and eject him from the entire holding, even if the eviction has been only from a portion thereof, a position which cannot be justified on any conceivable principle of law. The true position is that the eviction of the tenant, whether from part of the demised premises or from the whole, entails a suspension of the entire rent, while the eviction lasts, whether the tenant remains in possession of the residue or not; the tenancy, however, is not thereby terminated, nor is the tenant discharged from the performance of his covenants other than payment of the rent, such as a covenant to repair: *Hodgskin* v. *Queenborough* (1); *Pellat* v. *Boosey* (2); *Morrison* v. *Chadwick* (3); *Newton* v. *Allin* (4).

Now in the cases before us the Courts below have found that in or about the year 1853, the predecessor of the plaintiffs did dispossess the predecessors of the tenant defendants from portions of the lands of their tenancies. It is at this distance of time impossible to determine with accuracy how much land was taken away from each of these holdings and absorbed in the garden. The plaintiffs, however, have argued before this Court that in order to determine their rights it is obligatory upon the Court to investigate precisely how much land was taken away by them from the tenants. In our opinion, it is not necessary to adopt such a course. Whether the lands which were taken by the predecessors of the plaintiffs from the predecessors of the tenant defendants did or did not accurately correspond, in each instance, to a three annas share of this land comprised in each tenancy, the result is the same; because, by reason of this eviction, so long as it continued—and it has continued up to the present time—the plaintiffs could not claim from the tenants the rent otherwise payable to them as landlords; no question of apportionment arises, for, where there has been an eviction, the entire rent is suspended. Consequently, at the date when the proceedings under the tenth chapter of the Bengal Tenancy Act took place and the record of rights was prepared, no rent was in law payable to the plaintiffs by the tenants defendants. In this view, the settlement officer could not possibly make an entry in the record of rights to the effect that rent is payable by the tenant defendants, to the plaintiffs. Clause (e) of section 102 shows that it is the duty of the settlement officer to enter in the record of rights the rent payable at the time the record of rights is in course of preparation. This has been placed beyond controversy, by Act III of 1898, B. C.; but it may be pointed out that the section,

(1) (1738) Willes 129.
(2) (1862) 31 L. J. C. P. 281; 8 Jur. N. S. 1107; 136 R. R. 862.
(3) (1849) 7 C. B. 266; 78 R. R. 627.
(4) (1841) 1 Q. B. 518.

as it stood before the amendment, has been interpreted in the same sense in the case of *Sri Narain Thakur* v. *Maharaja Sir Luchmeswar Singh Bahadoor* (1). Consequently, the problem before the settlement officer was to determine what rent if any, was payable by the tenants to the plaintiffs. He came to the conclusion that no rent was so payable, because the plaintiffs had evicted the defendants from portions of the lands of their tenancies. The Court of first instance took the same view, in all the suits, and, there can, in our opinion, be no doubt that the broad justice of the cases is on the side of the tenants. They were deprived by the plaintiffs of portions of their lands more than 60 years ago; the settlement officer has shown in the record of rights the actual quantity of lands now in their occupation, and the rent paid by them for such lands to the 13 annas proprietors. The plaintiffs do not seek to have the entry as to area altered by the inclusion of the lands absorbed by them; they desire to have the entry as to the rent payable altered; but the alteration, if made, will not represent the true state of facts; it will show that the plaintiffs are entitled to rent from the tenants for the lands now in their occupation, which is contrary to the facts found.

We have already stated that the Subordinate Judge has confirmed the decrees of the trial Court in 32 of the suits; there can be, no doubt, we think, that the concurrent decision of the two Courts in these cases is correct. We have next to consider the 67 cases where the Subordinate Judge has varied or reversed the decision of the primary Court. These cases may be divided into three groups. In the first group are comprised four suits in which the rent receipts produced show that the tenants had acquiesced in the eviction effected by the plaintiffs, as they had been allowed reduction of rent for the land taken away from them. This clearly makes no difference in the position of the tenants. The Subordinate Judge holds that in order to suspend the rent, the eviction must be forcible dispossession. It is well settled, however, that the dispossession need not be by violence. To constitute an eviction, it is not necessary that there should be an actual physical expulsion by force or violence from any part of the premises; any act of a permanent character done by the landlord or his agent with the intention of depriving the tenant of the enjoyment of the demised premises or any part thereof operates as an eviction: *Upton* v. *Townend* (2);

(1) (1901) 6 C. W. N. 592.
(2) (1855) 17 C. B. 30; 104 R. R. 562.

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Henderson v. *Mears* (1); *Baynton* v. *Morgan* (2). The result to the tenant is precisely the same, whether he is expelled by violence or is obliged, from the exigencies of this situation, to submit quietly to the high-handed act of a powerful landlord.

In the second group are comprised 27 suits, where the Subordinate Judge has found that rent had been realized from the defendants by the plaintiffs up to 1883, and not later, as the collection papers of the subsequent period were fabricated and could not be trusted. The position then is that rent is shown to have been paid not later than 1883. Under the circumstances, it was clearly open to the settlement officer to hold that no rent was proved to have been payable in 1909 when the record of rights was made. It is, we think, impossible to hold that the entry made by the settlement officer is erroneous and should be amended. In the third group are comprised 36 suits, where the Subordinate Judge has arrived at an extraordinary conclusion. He has held that the evidence indicates that the entries made in the record of rights are erroneous, but that the plaintiffs are not able to establish how the entries should be amended. He has overlooked that the burden of proof in these cases was entirely upon the plaintiffs. The record of rights is *prima facie* correct; but, besides that, the plaintiffs as plaintiffs have to establish their allegations. They seek a particular declaration. If the evidence they adduce is not sufficient to enable the Court to hold that the declaration they seek should be made, the only course open is to dismiss the suits. We are unable to appreciate how any decree of the kind made by the Subordinate Judge could possibly have been made. The result of the decree is that the whole matter is left in uncertainty; the record of rights is pronounced to be incorrect; but the Subordinate Judge is not able to specify how the entries in the record of rights should be amended. In a suit under section 106 of the Bengal Tenancy Act, the plaintiff is not entitled to a declaration that a specific entry in the record of rights is not correct as it stands; he must go further and establish, in what respect it is incorrect and how it should be amended; if he is unable to do this, his suit must fail. Our conclusion is that in the cases where the Subordinate Judge has reversed or modified the decrees of the Court of first instance his decrees cannot be supported.

The result is that appeals Nos. 1211 and 2007 to 2037 of 1913 are dismissed with costs; appeals Nos. 1318 to 1384 of 1914 are

(1) (1859) 28 L. J. Q. B. 305; 7 W. R. (Eng) 554.
(2) (1888) 22 Q. B. D. 74.

allowed and the decision of the first Court in each case is restored with costs of all the Courts. We assess the hearing-fee in this Court in each case at rupees eight only.

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Appeals Nos. 1211 and 2007 to 2037 of 1913 dismissed: Appeals Nos. 1318 to 1384 of 1914 decreed.

CRIMINAL REVISION.

Before Sir Lancelot Sanderson Knight, Chief Justice, and Mr. Justice Walmsley.

F. A. BROWN

v.

ANANDA LAL MULLICK.*

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July, 28.
August, 3.

Information to the police of the commission of an offence—Examination of the informant before Court—Process issued by Court—Indian Penal Code (Act XLV of 1860), Sec. 211—Prosecution for making a false charge to the Police—Sanction of the Court, if necessary—Criminal Procedure Code (Act V of 1898, Sec. 195 (b).

Where an information to the Police of the commission of an alleged offence was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the Police, and where the complaint was investigated by the Court, sanction or a complaint of the Court itself under section 195 cl. (b) of the Code of Criminal Procedure would be necessary, before the Court could take cognisance of an offence punishable under section 211 of the Indian Penal Code alleged to have been committed by making a false charge to the Police, on the ground that it was an offence committed in relation to a proceeding in Court.

Putiram Ruidas v. *Mahomed Kasem* (1); *Jadunandan Singh* v. *Emperor* (2); and *Emperor* v. *Hardwar Pal* (3) commented on.

Tayabullah v. *King-Emperor* (4) referred to.

Application for Revision under section 435 of the Criminal Procedure Code.

* Criminal Revision No. 607 of 1916, for quashing the proceedings pending in the Court of Mr. K. N. Chowdhury, Honorary Magistrate at Sealdah.

(1) (1895) 3 C. W. N. 33.

(2) (1909) I. L. R. 37 Calc. 250; 10 C. L. J. 564.

(3) (1912) I. L. R. 34 All. 522.

(4) (1916) 24 C. L. J. 134.

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Rule obtained by the Petitioner, F. A. Brown, for quashing proceedings pending against him under section 211 of the Indian Penal Code, in the Court of Mr. K. N. Choudhury, Honorary Magistrate at Sealdah.

The material facts will appear sufficiently from the judgment of Sanderson, C. J.

Babus Atulya Charan Bose and *Jagat Chandra Bose* for the Petitioner.

Mr. Gregory and *Babu Manmatha Nath Mukherjee* for the Opposite Party.

C. A. V.

The following judgments were delivered :

August, 3.

Sanderson, C. J.—In this case the petitioner, Mr. Brown, on the 25th of February 1915, laid an information at the Chitpore Police station, charging one A. L. Mullick, who was the managing director of the Company in which Mr. Brown was a shareholder, with the theft of certain steel joists and other articles belonging to the Company. The Engineer of the Company was charged with aiding and abetting the alleged offence.

The Sub-Inspector after investigating the matter refused to take action upon the information.

Thereupon, the petitioner on the first of March 1915, lodged a complaint before the sub-divisional officer of Sealdah, and the charge which was alleged in that complaint was under section 380 of the Indian Penal Code against A. L. Mullick, namely, theft, and against the Engineer, for aiding and abetting that offence.

This was sent by the Sub-Divisional Officer to the Honorary Magistrate at Sealdah for disposal.

Before the Honorary Magistrate the petitioner was examined on oath, and then process was issued by the Magistrate against A. L. Mullick, charging him with an offence under section 380, and the Engineer with an offence under section 380 read with section 109, of the Indian Penal Code.

It should be noted that this was a charge to the same effect as that made by the petitioner to the Police.

Then the Honorary Magistrate retired, and the result was that the Sub-Divisional Magistrate put the case on his own file.

On the 10th of March 1915, the Engineer laid a complaint charging the petitioner, Mr. Brown, under section 211 of the Indian Penal Code, that is to say, with making a false charge against him knowing that there was no just or lawful ground for such charge,

and with intent to cause injury to the complainant. With regard to that matter, on the 23rd of March 1915, the Sub-divisional Officer, according to the note on the order-sheet said, "I have seen the police papers. They do not justify any step being taken in this case. There is a cross case in the file of Rai B. N. Bose Bahadur. Put up after the disposal of that case." A similar application was made by A. L. Mullick and a similar order, as I understand, was passed.

Then the case which was instituted by Mr. Brown, the petitioner, was enquired into, 15 witnesses were examined for the prosecution, and after numerous adjournments, on the 23rd of December 1915, the Sub-Divisional Officer discharged the accused A. L. Mullick and the Engineer basing his judgment upon this : He said, "The question is, can a case like this lie against the Managing Director at the instance of only one share-holder who holds only 600 shares out of 2500 shares .... A member of a company cannot maintain an action in which he sues on behalf of himself and all other members of the company in respect of wrongs committed against or frauds upon the company, as the wrongful or fraudulent acts can be confirmed by the majority of the corporation....... In the present case also nothing has been done to ascertain the views of the other share-holders and taking it for granted that the prosecution story is true, it is not known what view the majority of the share-holders in meeting of the Company will take in the matter, and, as such, no case can lie." The correctness of this judgment has not been argued and is not under discussion, but it is to be noted that the Sub-divisional Officer did not decide that the prosecution had been brought without *bona fides*.

On the 11th of March 1916, two cases were brought : the *first* by A. L. Mullick ; and, the *second* by the Engineer against the petitioner Mr. Brown ; and they were made over to the Honorary Magistrate : And, after several adjournments and orders with reference to the two cases, a Rule was obtained in this Court on the 19th of June 1916, to show cause why the proceedings against the petitioner Brown which were pending at the instance of A. L. Mullick should not be quashed.

The charge made by A. L. Mullick in his complaint was that the petitioner Mr. Brown had brought a false charge of theft against him at Chitpore Thana, knowing that he had no justification for it, and that such charge was brought maliciously to do harm to A. L. Mullick : and, this charge was based upon section 211 of the Indian Penal Code.

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The main point upon which the Rule was obtained was that the offence charged was in relation to a proceeding in the Court and that no sanction of that Court had been obtained; and, consequently under section 195 (b) of the Criminal Procedure Code that Court could not take cognizance of the alleged offence.

Learned Counsel for A. L. Mullick showed cause and argued that inasmuch as the alleged false charge which was complained of was made in the Chitpore Thana and not in Court no sanction was necessary.

The learned vakil for the petitioner replied that when an information is followed by a complaint to the Court, sanction is necessary under section 195.

Apart from any authorities, I should have no doubt as to the construction of the statute, and that under the circumstances of this case where the information to the Police was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the Police, and when the complaint has been investigated by the Court, sanction, or a complaint of the Court itself under section 195 (b) of the Criminal Procedure Code would be necessary, before the Court could take cognizance of an offence punishable under section 211 of the Indian Penal Code alleged to have been committed by making a false charge to the police, on the ground that it was an offence committed in relation to a proceeding in Court. If A. L. Mullick had based his charge on section 182 of the Indian Penal Code, which he might have done, the sanction of the Police officer to whom the alleged false charge was made, or the sanction of some public servant to whom he was subordinate would have been necessary. If he had based his case on the allegations made by the petitioner in the Court, clearly the sanction of the Court would be necessary before he could take proceedings against the petitioner under section 211. But it is alleged that A. L. Mullick can base his charge upon section 211, confining it to the allegations of the petitioner in the Police office and proceed without the Court's sanction, although there was no material difference between the information to the Police and the allegations presented in the Court. I do not think this was the intention of the Legislature. To hold otherwise might lead to unreasonable results, *e. g*, assume a case where the information to the Police is followed up by a complaint of a similar nature and to the same effect in Court, which after investigation by a Magistrate is discharged: the person who had been accused then applies to the Court for sanction to prosecute the person who laid

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the complaint for making a false charge in Court: the Court refuses such sanction: According to Mr. Gregory's argument the person who had been accused can then proceed without any sanction against the prosecutor alleging that he made a false charge to the Police in the *thana*, relying on the same allegations and the same facts, which the Magistrate has already investigated and as to which he had refused his sanction. Such a construction would be most unreasonable and in my judgment is not warranted by the language of the statute.

With regard to the cases which were quoted to us, the first was: *Putiram Ruidas* v. *Mahomed Kasem* (1). It is to be noted that in that case the Rule was granted in the following terms, "Let a rule issue to the Magistrate to show cause why the sanction for prosecution granted by the Honorary Magistrate should not be revoked upon the ground that such sanction could only have been given by the Court to which the original complaint had been made." The rule was discharged upon that ground. But the Court went on to deal with the further question and laid it down in these terms; "It appears, however, that sanction has really been granted by the Honorary Magistrate to prosecute the petitioner for bringing a false charge against Mahomed Kasem and others before the Balliaghatta Police, but that was not an offence "committed in or in relation to any proceeding" in his Court, and therefore it seems to us that no sanction from the Honorary Magistrate was necessary, and upon that ground we think we ought to set it aside." In my judgment, that decision was an *obiter dictum*—it was not necessary for the decision. The learned Judges had already discharged the Rule upon another ground: and, having regard to what appears at the end of the judgment I do not quite follow the reasoning of the learned Judges, because they say as follows "Observing at the same time that we see no reason why the prosecution should not proceed without any sanction whatever, the offence having been committed in the laying of a criminal charge before the police, that charge having now been enquired into judicially and the enquiring Magistrate being of opinion that it is a fit case for the prosecution of the petitioner." If they thought that no sanction of the Magistrate was necessary, then I fail to understand why it was necessary for them to draw attention to the fact that the inquiring Magistrate was of opinion that it was a fit case for the prosecution of the petitioner. I do not myself feel bound by the decision of that case, as I have said the opinion of the learned Judges was *obiter dictum*.

(1) (1895) 3 C. W. N. 33.

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The other case cited by Mr. Gregory, was the case of *Jadu Nandan Singh* v. *Emperor* (1). There the question was as to the proper construction of section 476 of the Criminal Procedure Code, as to which different considerations arise, having regard to the language which is used in section 476, different to that of the section which is now under consideration. The *ratio decidendi* is made quite clear by the learned Judges at page 254 where they say, "Let us now turn to section 476. That section—we quote only so much of it as applies to the present case—provides, that, when any criminal Court is of opinion that there is ground for enquiring into any offence referred to in section 195 and committed before it, or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary, may send the case for enquiry or trial to the nearest Magistrate of the first class." The construction of the section which is now being considered only came into consideration incidentally in that case ; and, in my judgment, the point which is now under consideration does not, seem to have been present to the learned Judge's mind, and I do not think having regard to the terms of the judgment that they ever intended that decision to cover the point in the present case.

A case was cited by the learned vakil for the petitioner *viz*, *Emperor* v. *Hardwar Pal*, (2). It is not necessary for me to express any opinion as to whether that judgment is correct, because the judgment in that case goes a great deal further than the judgment that we are giving in this case, inasmuch as the facts are quite different from the facts in this case. They were to this effect that the person who was alleging that a false charge was made against him in the police station was not before the Magistrate, although others who were inplicated in the same charge, were. The head note is this: "H made a report against several persons, including one S., at a police station, charging them with rioting and voluntarily causing hurt. The police made inquiry and sent up several persons for trial, but not S. Some of these were convicted by the Magistrate, but acquitted by the Sessions Judge. Thereupon S made a complaint to the Magistrate, charging H with having made a false report in respect of himself to the police. The Magistrate took cognizance of the complaint. *Held*, that the Magistrate had no power to take cognizance of the complaint by reason of the absence of sanction." As I have said before, it is

(1) (1909) I. L. R. 37 Calc. 250 ; 10 C. L. J. 564.

(2) (1912) I. L. R. 34 All. 522.

not necessary for my judgment to express any opinion as to whether we are prepared to go so far as the decision in the case in the Allahabad series, because the facts in the present case are different from the facts in that case : and, in my opinion the present question is much easier for decision than the one presented in the other case. There is one passage in the judgment to which I wish to refer, which I think helps this case, and it is this (at page 527): "It is obvious that there is considerable relation between the first report and the proceeding in Court, for the latter is the result of the former. The report led to the police inquiry and the latter to the proceeding in Court. The offence if it be one under section 211 committed in respect to Sher Bahadur Singh was committed in relation to the proceeding in Court, and at least the sanction of the Court would be necessary under section 195 (1) (*b*)." As I have said before, I guard myself by saying that I am not now expressing an opinion whether this case is right or wrong : If it is right, then the reasoning applies a portion to this case which is now before us, and confirms the opinion at which I have already arrived upon the construction of the words of the statute.

I am confirmed in the judgment which I have arrived at by a decision of Mr. Justice Mookerjee and Mr. Justice Sheepshanks in the case of *Tayabulla* v. *King-Emperor* (1) and, it must be remembered that Mr. Justice Mookerjee was a party to the decision in the case of *Jadu Nandan* v. *Emperor* (2). The head note of that case is this: "No sanction to prosecute is necessary under section 195 (1) (*b*) of the Code of Criminal Procedure when a false charge has been made to the Police and has not been followed by a judicial investigation thereof by a Court. Where, therefore, the complainant to the Police never applied to the Magistrate for investigation, nor did he impugn the correctness of the Police Report as to the falsity of the complaint nor did he pray that the person accused by him might be brought to trial, nor was he examined on oath by the Magistrate—*Held*, that the order for sanction to prosecute him was bad, if it was deemed to have been granted under section 195 of the Code, inasmuch as there was no 'complaint' within the meaning of section 4 (*h*) of the Code, and the offence could not be said to have been committed in a proceeding in a Court." The passage in the judgment to which I wish to refer is this, (page 135). "No sanction was required in this case under section 195 (1) (*b*). A sanction is requisite in respect of an offence under section 211, Indian Penal Code, only when such

(1) (1916) 24 C. L. J. 134. (2) (1909) I. L. R. 37 Calc 250; 10 C. L. J. 564.

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offence has been committed in or in relation to any proceeding in any Court; no sanction is necessary when a false charge has been made to the Police and has not been followed by a judicial investigation thereof by a Court." * * * * * * * * "The position is different where, upon the Police report as to falsity of the complaint, the complainant insists upon a judicial investigation; if he does so, he is deemed to have preferred a complaint to the Magistrate; if the Magistrate finds his case to be false, a sanction would be requisite under section 195 (1) (*b*), as the offence may be said to have been committed in a proceeding in a Court." It is satisfactory to us that we had arrived at the above mentioned decision before we knew of the conclusion to which Mr. Justice Mookerjee and Mr. Justice Sheepshanks came the other day, and to find that their judgment is in conformity with ours.

For these reasons I think that the Rule must be made absolute and the proceedings against the petitioner must be quashed.

Walmsley, J.—I agree in the judgment that has been delivered by the learned Chief Justice.

A. N. R. C. *Rule made absolute.*

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr. Justice Smither.

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August, 16.

CHANDRA KUMAR GHOSE

v.

MOHENDRA KUMAR GHOSE.*

Local enquiry, how to be made—Indiscriminate local investigation, effect of—Judgment of trial Court, vitiated by extraneous matter—Trial Court's finding of fact, if influences the appellate Court—Appellate Court's judgment, if to be set aside.

In holding a local investigation a Magistrate ought to take great care to see that he is not approached by an outsider or does not allow his mind to be affected by outside matters. The proper thing for him to do is to be attended by a representative of either side for the purpose of identifying the points which are

* Criminal Revision No. 730 of 1916, against the order of A. H. Clayton Esq., District Magistrate of Chittagong, dated the 2nd May, 1916, affirming that of Moulvi Aman Ali, Honorary Magistrate of Chittagong, dated the 3rd April, 1916.

material in the case on the one side and the other, and he ought not to allow himself to enter into general conversation with the people of the neighbourhood about the case.

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Where a Magistrate held a local enquiry not in accordance with law, and along with other evidence in the case came to a finding on a question of fact, and the appellate Court affirmed the decision of the trial Court :

Held, that the finding of the trial Court was vitiated, and the judgment of the appellate Court was also liable to be set aside, as the appellate Court must have been naturally influenced to some extent by the finding of the trial Court upon the question of fact.

Criminal Revision.

Rule obtained by the Petitioner, Chandra Kumar Ghose.

The case for the prosecution was that the accused cut a number of trees from the land belonging to the complainant, Mohendra Kumar Ghose, and caused damage amounting to Rs. 40. The accused denied the occurrence, as also the right and title over the land claimed by the complainant. The parties examined a number of witnesses, and the learned Magistrate also held a local enquiry. The Magistrate held that the accused had committed mischief, and convicted him under section 426 of the Indian Penal Code, and sentenced him to pay a fine of Rs. 30, in default to undergo rigorous imprisonment for a month, and directed that out of the fine when realised, Rs. 10 would be given to the complainant.

Against that order passed by the learned Magistrate, the accused preferred an appeal to the District Magistrate of Chittagong, who affirmed the findings of the first Court, and dismissed the appeal. The accused then moved the High Court and obtained the Rule.

Mr. J. M. Sen Gupta and *Babu Tarakeswar Nath Mitra* for the Petitioner.

Babu Dasarathi Sanyal (who was allowed to appear) for the complainant Opposite Party.

The following judgments were delivered :

Sanderson, C. J.—In this case we think that the Rule should be made absolute. *August, 16.*

It is a small case—the damage that was done was small; the fine that was imposed was small and the compensation that was awarded was small—and if it had not been for the fact that my learned brother and I, when we granted the Rule thought that a question of principle involved, we certainly would not have granted it. But inasmuch as there was an allegation that the Magistrate who tried the case had thought it right at the invitation of both parties to go and make a local inspection as to whether the land upon which the fruit trees

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were growing was outside the accused's land or within the accused's land, and when he got there, he had a sort of indiscriminate talk with every body who happened to be present there, which might or might not have affected his judgment in the case we issued the Rule. The Magistrate in his explanation says " I had talks with many persons including parties and their pleaders and muktears." But, he says that he did not take any notes because he was not allowed to make any notes on the spot, as one of the pleaders gave him to understand that the case would be surely compromised.

We do not think that that is the proper way of trying a case. *If it is necessary to have a local investigation, great care ought to be taken by the Magistrate who holds the local investigation to see that he is not approached by an outsider or allows his mind to be affected by outside matters. The proper thing for him to do is to be attended by a representative of either side for the purpose of identifying the points which are material in the case on the one side and the other, and he ought not to allow himself to enter into general conversation with the people of the neighbourhood about the case. It is quite true, as the learned pleader pointed out that this case went on appeal to the superior tribunal and that tribunal came to the same decision as the Court of first instance. But the Court of first instance came to the conclusion upon a most important point in the case, which was a question of fact, after it had held this local inquiry: and, when the main question in the case is a question of fact, the appellate Court must be naturally influenced to some extent by the finding of the first Court upon the question of fact. It is impossible for us to say that the appellate Court was not influenced by the finding of the first Court upon the question of fact, and if the finding of the first Court was vitiated, then it may be that the finding of the second Court was also vitiated. For these reasons it is safer to make this Rule absolute and direct that the case be retried, unless the parties put their heads together and settle the dispute. Really, in a case like this, where the parties are related to one another and where the matter is such a small one it is a great pity that further expenses of litigation should be incurred.

Smither, J.—I agree.

A. N. R. C. *Rule made absolute.*

PRIVY COUNCIL.

PRESENT :—*Lord Shaw, Lord Sumner, Lord Parmoor, and Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.*

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

SRI RAJAH CHELIKANI RAMA RAO AND OTHERS.

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April, 4, 5.
July, 7.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS].

Land, incorporation of—Reserved forest—Islands arising in sea within territorial limits of the Indian Empire—Property therein—Dominion of the bed of the sea—Adverse possession—Burden of proof—Onus of establishing ownership by reason of possession for a certain requisite period lies on the person asserting such possession—Limitation—Limitation Act (XV of 1877), Sch. II. Arts. 144, 149,—Forest settlement procedure—Madras Forest Act (Madras Act V of 1882), S. 10—Appeal to the High Court from decision of District Judge under that section.

Where the ordinary Courts of a country are seized of a dispute as to a legal right to possession of and property in land, express provisions are required to exclude the ordinary incidents of litigations, e. g. a right of appeal.

Held, accordingly, that when proceedings as to claims under the Madras Forest Act, reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedures, orders and decrees, the ordinary rules of the Civil Procedure Code apply, and an appeal lies to the High Court against a decree of the District Court passed under section 10 of the Act, on appeal from the decision of a Forest Settlement Officer : *Kamaraju* v. *The Secretary of State* (1) approved.

Rangoon Botatoung Co. Ltd. v. *The Collector of Rangoon* (2) distinguished.

The Crown is the owner and the owner in property of islands arising in the sea within the territorial limits of the Indian Empire. *Held*, accordingly, that islands which had been formed in the bed of the sea near the mouth or delta of the tidal and navigable river Godaveri were the property of the Crown.

Lord Fitzhardinge v. *Purcell* (3) ; *Lord Advocate* v. *Clyde Navigation Trustees* (4) ; *Lord Advocate* v. *Wemyss* (5) approved and followed.

Reg. v. *Keyn* (6) distinguished.

There is no foundation for the theory that the Territory of the Crown ceases at low-water mark. "*The Anna* (7)" approved and followed.

The onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession.

(1) (1888) I. L. R. 11 Mad. 309.
(2) (1912) L. R. 39 I. A. 197 ; 16 C. L. J. 245 ; I. L. R. 40 Calc. 21.
(3) (1908) L. R. 2 Ch. D. 139.
(4) (1891) 19 Rittie 174.
(5) L. R. (1900) A. C. 48.
(6) (1876) L. R. 2 Ex. D. 63.
(7) (1905) 5 C. Rob. 373.

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Objectors to afforestation preferring claims under the Madras Act V of 1882 are in law in the same position as persons bringing a suit in an ordinary Court of justice for a declaration of right. In both cases Art. 144 of the Indian Limitation Act, Sch. II applies, the period of twelve years thereunder being however, extended to 60 years by article 149. In an ordinary suit for declaration the onus of establishing possession for the requisite period rests on the plaintiff, and the situation of a claimant under afforestation proceedings is the same upon this point.

Radha Gobind Roy Saheb v. *Inglis* (1) approved and followed.

The Secretary of State for India v. *Vira Rayan* (2) distinguished.

Sri Rajah Chelikani Rama Rao v. *The Secretary of State for India* (3) reversed.

Consolidated appeals from two decrees of the Madras High Court, *Sri Rajah Chelikani* v. *Secretary of State* (3), reversing in second appeal two decrees of the District Court of Godavari which confirmed judgments of the Forest Settlement Officer of Godaveri.

The facts of the case are sufficiently stated in their Lordships' judgment. The main question for determination was whether the appellant was entitled to constitute certain islands which had formed in the sea at the mouth of the Godaveri, and which were claimed by the respondents, to be a reserved forest under the Madras Forest Act. A subsidiary question was whether under the Act there was any right of appeal, beyond the District Court. For a report of the judgment of the High Court: See *Sri Raja Chelikani Rama Rao* v. *The Secretary of State for India* (3).

Sir Erle Richards, K.C., and *K. Brown* for the Appellant submitted that there was no right of appeal to the High Court against the decisions of the District Court, which were final under section 10, clause 2 of the Madras Forest Act. The Act did not provide for a second appeal (vide section 16). The decision of the District Court was not a decree within the Code of Civil Procedure, 1882, consequently there was no appeal given by section 584 of the Code: *Rangoon Botatoung Co.* v. *The Collector, Rangoon* (4); *Meenakshi Naidoo* v. *Subramaniya Sastri* (5); *Ravi Veera Naghavuhu* v. *Bemma Devara Venkata Narsimha* (6).

The case of *Kamaraju* v. *Secretary of State for India* (7), was

(1) (1880) 7 C. L. R. 364. (2) (1885) I. L. R. 9 Mad. 175.
(3) (1909) I. L. R. 33 Mad. 1.
(4) (1912) L. R. 39 I. A. 197; 16 C. L. J. 245; I. L. R. 40 Calc. 21.
(5) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.
(6) (1914) L. R. 41 I. A. 258; 20 C. L. J. 375; I. L. R. 37 Mad. 443.
(7) (1888) I. L. R. 11 Mad. 309.

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wrongly decided and the subsequent decisions of the Madras High Court were based on that Full Bench decision.

Next, the High Court had wrongly decided that the onus was on the Crown to prove that the possession of the respondents commenced or became adverse within 60 years of the institution of the suit. It was not disputed that the title to the lands was originally in the Crown, and having regard to the origin and nature of the lands that could not be disputed. The onus was therefore upon the respondents to prove that they had a title against the Crown. Under the Madras Forest Act, the respondents were the claimants and they had to establish their title to the lands. They could only do so by proving 60 years adverse possession against the Crown. And even if the Crown were suing for possession of the lands, as plaintiff, the onus was still upon the respondents. The Crown was never in possession of the lands and consequently, Art. 142 of the Limitation Act, 1877, did not apply. Art 144 applied, and that article read with Art. 149 made it clear that it was for the respondents to prove that their possession became adverse more than 60 years before the date of the notification. The distinction between cases in which the plaintiff alleges dispossession and cases under Art. 144 appears from the following cases: *Maharaja Koour Baboo Sitrasur Singh* v. *Baboo Nund Loll Singh* (1); *Rao Karan Singh* v. *Rajah Bakar Ali Khan* (2). The former was a case of dispossession, and the latter a case within Art. 145 of the Limitation Act of 1871. The appellant's view is supported by *Radha Gobind Roy Saheb* v. *Inglis* (3). That decision has been followed in the following cases: *Faki Abdulla* v. *Babaji Gungaji* (4); *Hanmanta Kolay* v. *Mahadea Komdaji* (5); *Tarusbar* v. *Venkutrao* (6); *Alima* v. *Kuth* (7). In *the Secretary of State for India* v. *Vira Rayan* (8), the title of the Crown was not proved and the *dictum* was *obiter*. In *Secretary of State for India* v. *Bavotti Haji* (9), defendant had proved 60 years' possession. Furthermore the Courts in this case held that the respondents had no possession of the lands before 1882. Each claimant was bound to prove his exclusive possession for the statutory period. One trespasser cannot take advantage of the possession of another trespasser. The High Court had erroneously

(1) (1860) 8 M. I. A. 199, 220.
(2) (1882) L. R. 9 I. A. 99, 102; I. L. R. 5 All. 1.
(3) (1880) 7 C. L. R. 364.
(4) (1890) I. L. R. 14 Bom. 458.
(5) (1893) I. L. R. 18 Bom. 513.
(6) (1902) I. L. R. 27 Bom. 43 (56).
(7) (1890) I. L. R 14 Mad. 96.
(8) (1885) I. L. R. 9 Mad. 175 (179).
(9) (1890) I. L. R. 15 Mad. 315.

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held that it was for the Crown to prove that it had a subsisting title. The title being originally in the Crown, that title subsisted unless and until the Crown lost it by full sixty years' adverse possession.

Sir R. Finlay, K. C., and *Dube*, for the Respondents:—As to the preliminary objection, the Full Bench decision in *Kamaraju* v. *Secretary of State for India* (1) has been acted upon in several cases since 1888. Even the Crown had filed second appeals. The right of appeal was given by the Code of Civil Procedure from all decrees of the District Court and was not affected by the Forest Act. The decisions here were in terms and in substance decrees within the meaning of section 2 of the Code of Civil Procedure. (Their Lordships intimated that they did not wish to hear further argument upon the preliminary point). By proceeding under the Madras Forest Act the Crown cannot place itself in a better position than in a suit for possession by the Crown. In every suit for possession, the plaintiff must prove that he has a title which is not barred by statute. In an action in ejectment the plaintiff must prove both title and possessory title. (Darby and Busanquet on Limitations, 2nd ed. pp. 299 and 544). That general principle was applicable to England, as well as to India: *Maharaja Koour Baboo Sitrasur Singh* v. *Baboo Nund Loll Singh* (2). That decision applies to suits whether they are within Art. 142 or Art. 144: *Radha Gobind Roy Sahib* v. *Inglis* (3) was explained in *Mano Mohun Ghose* v. *Mothura Mohun Roy* (4). The onus was upon the Crown to show either possession within 60 years or that the possession of the respondents became adverse within that period. Under section 4 of the Madras Forest Act, only land at the disposal of Government could be constituted into a reserved forest. All Courts had concurred in finding that the respondents have been in possession for at least 20 years. There was reliable documentary evidence which carried respondents' possession further back, nearly forty years. It was admitted that the Crown was never in possession, the Crown must therefore establish that it had a possessory title not barred by limitation at the commencement of the proceedings. Reference was made to the following: *Secretary of State for India* v. *Vira Rayan* (5); *Mohima Chunder Mazoomdar* v. *Mohesh Chunder Neogi* (6); *Rao Karan Singh* v. *Rajah Bakar Ali Khan* (7); *Krishna Aiyan* v. *The Secre-*

(1) (1888) I. L. R. 11 Mad. 309.
(2) (1860) 8 M. I. A. 199.
(3) (1880) 7 C. L. R. 364.
(4) (1881) I. L. R. 7 Calc. 225 (232).
(5) (1885) I. L. R. 9 Mad. 175.
(6) (1888) L. R. 16 I. A. 23; I. L. R. 16 Calc. 473
(7) (1882) L. R. 9 I. A. 99; I. L. R. 5 All. 1.

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tary of State for India (1); *Pandurang Govind* v. *Balkrishna Hari* (2); *Secretary of State for India* v. *Kota Bayanamma Garu* (3); *Anangamanjari Chowdhrani* v. *Tipura Soondari Chowdhrani* (4); *Inayat Husen* v. *Ali Husan* (5); *Attorney General for B. C.* v. *Attorney General for Canada* (6).

Sir Erle Richards K. C., in reply: In an action for ejectment in England, the plaintiff had to allege and prove a dispossession. The principle with regard to limitation under the English Statute does not apply to India which had a limitation Act of her own. The knowledge of ouster by adverse possession can only be in the defendant. If the onus were put on the plaintiff it would impose an impossible burden on him. The nature of the jungle land was such that the Crown was not in a position to say when the possession of squatters commenced. The Forest Act puts the onus on the claimants who desire to prove their ownership. They can only do so by proving 60 years' adverse possession. Reference was made to *Rajah Kishen Dutt Ram Panday* v. *Narendur Bahadoor Singh* (7).

The judgment of their Lordships was delivered by

July, 7.

Lord Shaw:—These are consolidated appeals from two decrees of date the 30th September, 1909, pronounced by the High Court of Judicature at Madras. The appeals relate to certain parcels of land claimed by two zemindars. These zemindars' claims were, on the 19th October, 1903, in certain proceedings under the Madras Forest Act (V of 1882), dismissed by the forest settlement officer of Godaveri. His judgments were affirmed by two decisions of the District Court of Godaveri, dated the 27th July, 1904. These decisions of the District Court were, however, reversed and varied by the High Court by the decrees now under appeal to the Board. The appellant is His Majesty's Secretary of State for India.

The question for determination is whether the appellant is entitled to constitute or incorporate the lands into a reserved forest under the Forest Act. The respondents are objectors and claimants under the Statute.

The physical facts are not in dispute; they have been found by the Courts below. They are quite simple. The lands are islands which have been formed in the bed of the sea near the mouth or delta of the river Godaveri. The Godaveri is a tidal and navigable

(1) (1909) I. L. R. 33 Mad. 173. (2) (1869) 6 Bom. H. C. R. 125.
(3) (1895) I. L. R. 19 Mad. 165.
(4) (1887) L. R. 14 I. A. 101 (110); I. L. R. 14 Calc. 740.
(5) (1897) I. L. R. 20 All. 182. (6) L. R. (1914) A. C. 153 (174).
(7) (1875) L. R. 3 I. A. 85.

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river. The islands are within a short distance, much under 3 miles, of the main land. The lands are now mostly jungle lands.

The Crown desires to constitute them into a reserved forest. The respondents object, and claim the lands. Their assertion is that these lands have been possessed by them and their predecessors in title from time immemorial, and that the lands are theirs. This assertion of property the Crown denies.

By the Statute already named, it is provided (section 3) that the Governor in Council may constitute any land at the disposal of the Government a reserved forest; that he shall publish a notification (section 4) containing this declaration, specifying "as nearly as possible the situation and limits of such land," and appointing a forest settlement officer "to enquire into and determine the existence, nature, and extent of any rights claimed by or alleged to exist in favour of any person in or over" such land. Provision is made (section 6) for requiring, within a period of three months from the proclamation, every person claiming right "either to present to such officer within such period a written notice specifying, or to appear before him within such period and state the nature of such right, and in either case to produce all documents in support thereof." Thereafter the forest settlement officer is to enquire and to record evidence (section 8). And (section 10) the forest settlement officer "shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part." If the claim be admitted, there are stipulated proceedings for the surrender, exclusion or acquisition of the right. But (section 10, ii) "if such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the District Court in respect of such rejection only."

What happened in the present case was that the claim was rejected. An appeal by the respondents was thereupon made to the District Court, and a decision was pronounced. It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the Statute just quoted. In their Lordships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench, *Kamaraju* v. *the Secretary of State for India in Council* (1)

(1) (1888) I. L. R. 11 Mad. 309.

a decision which was given in 1888 and has been acted on in Madras ever since.

It was urged that the case of *Rangoon Botatoung Company* v. *The Collector, Rangoon* (1) enounced a principle, which formed a precedent for excluding all appeal from the decision of the District Court in such cases as the present. Their Lordships do not think that that is so. In the *Rangoon case* (1) a certain award had been made by the Collector under the Land Acquisition Act. This award was affirmed by the Court, which under the Act meant "a principal Civil Court of Original Jurisdiction." Two judges sat as "the Court" and also as the High Court to which the appeal is given from the award of "the Court." The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried, and the provisions of the particular statute, it was held that there was no right "to carry an award made in an arbitration as to the value of land" further than to the Courts specifically set up by the statute for the determination of that value.

The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation. The objection taken is accordingly repelled.

Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, "De Jure Maris." He describes how "the king hath a title to *maritima incrementa* or increase of land by the sea; and this is of three kinds, *viz*:—

"1. Increase *per projectionem vel alluvionem.*

2. Increase *per relictionem vel desertionem.*

3. *Per insulæ productionem.*"

The lands in dispute fall under the third category, which is thus dealt with by Hale:—

"3. The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof. These upon the same account and reason *prima facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water."

(1) (1912) L. R. 39 I. A. 197; 16 C. L. J. 245.

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The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water. At what date soever they appeared, they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.

The case is not complicated by any point as to geographical situation ; the question of whether a limit from the shore seawards should be beyond 3 miles, should be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terræ*—no such questions arise here. The point is geographically within even 3 miles of British territory ; at that point islands have risen from the sea. Are those islands no man's land ? The answer is, they are not ; they belong in property to the British Crown.

The doubt raised upon this proposition was substantially rested on certain dicta pronounced in the case of *Reg.* v. *Keyn* (1). The Crown, admitted to be owners of the foreshore, is, so the suggestion is, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it is said, extend further seaward. It should not be forgotten that the *Franconia* case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of 3 miles from the shore.

When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound. Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of Cornwall in the Cornwall case—but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore.

In the case of *Lord Fitzhardinge* v. *Purcell* (2), Lord Parker, then Parker, J., expressed himself thus :—

" . . . . . Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers,

(1) (1876) L. R. 2 Ex. D. 63. (2) L. R. (1908) 2 Ch. D. 139 (166).

are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and *a fortiori* the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of *incrementa maris* seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Charta, operate to the detriment of the public right of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted."

It is true that the case cited dealt merely with the right of fowling ; but it was necessary in the determination as to that right to settle the true nature of the right in the land itself.

In Scotland the law is firmly settled, and in a similar sense. The question raised in *Lord Advocate* v. *Clyde Navigation Trustees* (1), was whether the latter body could dispose of dredgings taken from the river by depositing them in the bed of Loch Long, a sea-water loch. The crown resisted the claim, maintaining its ownership in the bed of the loch and in the bed of the sea for a distance of 3 miles from the coast. In the Outer House the entire question was fully dealt with by that very learned Judge, Lord Kyllachy, who expressed himself thus : "...... with respect to the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, *viz.*, the strip or area of sea within cannon-shot or 3 miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown right in the foreshore and in the land ? or is it only a protectorate for certain purposes, and particularly navigation and fishing ? I am of opinion that the former is the correct view, and that there is no distinction in legal

(1) (1891) 19 Rettie 174.

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character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within 3 miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is, therefore, to a large extent *extra commercium* ; but none the less is it in my opinion a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property." In the Inner House this view of the law was not dissented from, and Lord Young expressly agreed with it.

Last of all may be mentioned the case of *The Lord Advocate* v. *Wemyss* (1). The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question—not as to rights upon or over that portion of the bed of the sea, but as to the actual ownership of the corpus or thing itself—of which corpus the minerals formed a part. Upon this question the statement of Lord Watson was expressed as follows : "I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas or from the coast outward to the 3-mile limit, and also the minerals beneath it, are vested in the Crown."

In the opinion of the Board, this is also the law of India. The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire.

It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle. There is nothing to recommend a local jurisdiction over a space of water lying above a *res nullius*. As to practical results : the confusion that might be produced by leaving islands, emergent within the 3-mile limit, to be seized by the first comer is clear beyond controversy. He might be a foreign citizen : he would of course hoist the flag of his own nation, and that nation might proceed to fortify the emergent lands ; in short, it is not difficult to figure the anomalies and difficulties which the abandonment of the plain ground taken by Lord Watson would involve to this and to other nations.

The law in the sense now affirmed has not been denied effect in the Courts of this country, even when its enforcement has operated to the advantage or supposed advantage of foreign States. Lord Stowell dealt with such a position of affairs in "*The Anna*" (2).

(1) (1900) A. C. 48. (2) (1905) 5. C. Rob. 373.

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The case had reference to the capture of a vessel while on a voyage from the Spanish Main to New Orleans. The place of capture was 2 miles off certain islands. Those islands, at the mouth of the Mississippi, were, much as in the present case, formed by the silting up of sand and slob, but yet surrounded by navigable channels and in the open sea. The case sought to be made was that such islands were no part of American territory, and formed no datum for measuring the seaward mileage therefrom. This argument was rejected. Lord Stowell observed :—

* "Consider what the consequence would be if lands of this description were not considered as appendent to the main land, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other Power might occupy them ; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil."

Their Lordships do not doubt that the general law, as already stated, is supported by the preponderating considerations of practical convenience, and that, upon the particular case in hand, the ownership of the islands formed in the sea in the estuary or mouth of the Godaveri River is in the British Crown.

In these circumstances the question before the Board would appear to be extremely simple. Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years. The question simply is : Do the claimants establish such adverse possession ? If they do not, the basis of their claim fails. This was the way in which the matter was looked at, first by the forest settlement officer, and then by the District Court. In their Lordships' opinion the attitude of both these tribunals was correct in law.

Before the reversal of their decisions by the High Court is remarked upon, the following facts may be noted :—

It appeared that certain squatting had taken place, and that two zemindars, whose successors are respondents in this appeal, were rivals in seeking to set up some kind of right in the islands. They

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did not arrive at any settlement of their disputes until in or about the year 1882. The forest settlement officer in the course of a careful examination into the circumstances and rights, held that there was no evidence of adverse and exclusive possession and enjoyment prior to 1883, and that accordingly such possession and enjoyment so proved had not lasted long enough to establish a right against the Government.

In the District Court the same result was reached and the same finding on fact was made. The matter is accordingly concluded so far as possession goes; the Board accepts, as it must accept, the finding. Confirmation of the District Court's judgment would have followed that finding as a matter of course but for the view taken by the High Court on a point of law. It is thus expressed :—

"The District Judge then holds that as the title was originally in the Crown the claimants must prove adverse possession for sixty years. Here the District Judge is clearly wrong. Though the title was originally in the Crown, still, as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i.e.*, within sixty years before the notification, *Secretary of State* v. *Vira Rayan* (1); *Secretary of State for India* v. *Bavotti Haji* (2); *The Secretary of State for India* v. *Kota Bapanamma Garu* (3). As the several islands were formed gradually and probably appeared and became capable of occupation at different times, it may be that there is proof that some, if not all, of them came into existence as land capable of occupation within sixty years prior to the notification. In the case of such land the title of the Crown must be subsisting title. In the case of lands which came into existence as land capable of occupation more than sixty years prior to the notification, the Crown must show by evidence that it had a subsisting title at some time within that period.

"We must, therefore, ask the District Judge to return a finding as to whether the Crown has subsisting title to the whole or any portions of the claim land lying between Hope Island on the north and Neelarva on the south."

Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late

(1) (1885) I. L. R. 9 Mad. 175.
(2) (1890) I. L. R. 15 Mad. 315.
(3) (1895) I. L. R. 19 Mad. 165.

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in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, "I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions." Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

The application of this elementary doctrine is singularly clear, for there is a double finding of fact, a finding not disputed even in the High Court, that no adverse or exclusive possession was proved before the year 1882. The case of the respondents must accordingly fail.

This conclusion is in no way varied by reason of the shape of the present proceedings. In November and December 1901, in pursuance of the Act, the Governor of Madras in Council published a notification proposing to constitute the lands into a reserved forest. The respondents put in their claims before the forest settlement officer on the 14th and 23rd February, 1902. It apparently did not occur to them at that stage to view the law otherwise than has been stated above, because in the one petition the claim was that—"for over seventy years your petitioners' estate has been in the exclusive and absolute enjoyment of the land and forest now said to be reserved as Government forest," and in the other petition the claim was—"that the long and peaceful enjoyment of the same by the petitioners and their predecessors in title the petitioners have acquired a title by prescription to the said lands and forests, and the rights, if any, of others to the same are excluded by lapse of time."

In their Lordships' opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary Court of justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that article 144 of the Limitation Act XV of 1877 (Schedule II) applies, the period of twelve years thereunder being, however, extended to a period of sixty years by article 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite periods would rest upon

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the plaintiff. In their Lordships' opinion the situation of a claimant under afforestation proceedings is the same upon this point. Reference may be made to *Radha Gobind Roy Saheb* v *Inglis* (1) decided by this Board. Reference was made to various cases decided in lower Courts and stress was especially laid upon the decision in the Malabar Case: *The Secretary of State for India in Council* v. *Vira Rayan* (2). The facts therein were essentially different from the present. After a historical survey of the peculiar position of the lands there in question the learned Judges found "That the land appertains to the district of Malabar, and we agree with the Judge that there is no presumption in that district and in the tracts administered as a part by it, that forest lands are the property of the Crown." The ratio of the decision was found in this historical circumstance peculiar to Malabar. None of the cases cited have affected the authority of the case of *Radha Gobind Roy* (1).

Finally, their Lordships have some difficulty in understanding the view of the High Court to the following effect:—"Though the title was originally in the Crown, still as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, that is, within sixty years before the notification." In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But (2) with reference to the "subsisting title," it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains, and that fact forms "subsisting title." And (3) it is no part of the obligation of the Crown to fortify their own fundamental right by any enquiry into possession or the acceptance of any onus on that subject.

Their Lordships will humbly advise His Majesty that these appeals should be allowed, and that the judgments of the District Court of date the 27th July, 1904, should be restored. The respondents will pay the costs of this appeal and in the Courts below.

Solicitor, India Office:—Solicitor for the Appellant.

Douglas Grant:—Attorney for the Respondent.

J. M. P. *Appeals allowed.*

(1) (1880) 7 C. L. R. 364. (2) (1885) I. L. R. 9 Mad. 175.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

MALCHAND AND ANOTHER

v.

GOPAL CHANDRA GHOSAL AND ANOTHER.*

CIVIL. 1916. *November, 17.*

Insolvency—Presidency Insolvency Act (III of 1907), Secs. 14, 15 (1), 21 (1)—Petition, presentation of, an abuse of process of Court—Undue preference to one Creditor.

Per Curiam: Notwithstanding proof of the existence of the conditions mentioned in the statute, the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court; and, it is the duty of the Court to have regard to this aspect of the matter when the question is raised.

Per Mookerjee, J.: The insolvent's showing undue preference to one creditor is not a ground on which an adjudication order can be legitimately refused, but is a matter to be taken into consideration only at a later stage of the proceedings in insolvency.

Appeal by the Insolvents.

The material facts and arguments appear from the following judgment of

March, 14.

Greaves, J.—There are two applications before me in this matter, one is an application by the debtors for their discharge, the second is an application by one of the creditors who also opposes the discharge for the annulment of the adjudication. The facts of the case are as follows:—On 25th June 1905 these two insolvents were adjudicated on their own petition. Their debts amounted to a sum of Rs. 5,000 and no dividend whatsoever was paid. On 7th August 1906 they applied and obtained their personal discharge. There has been no final discharge. On 12th December 1912 they were again adjudicated upon their own petition. Their debts in this case amounted to Rs. 11,000 odd and there were no assets. This adjudication was subsequently annulled in various proceedings on 2nd February 1915, and accordingly the debtors presented another petition on 5th March 1915 asking for their adjudication. I take these adjudications, as I think it is only right to take them, as only amounting to two adjudications. Their debts at the time of the adjudication of 5th March 1915 were the same as at the date of adjudication in December 1912, i.e., Rs. 11,000 odd, and there were

* Appeal from Original Order No. 32 of 1916, against the order of Mr. Justice Greaves, dated the 14th March, 1916.

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no assets. The debtors were publicly examined, and it appeared that they had preferred an old creditor, although at the time that they paid this old creditor, the debts of the creditor, who now applies [illegible] annulment of their adjudication, had actually been incurred, having been incurred prior to 1912, these debts amounting to over Rs. 5,000. The insolvents by such payment divested themselves of any assets which were available for distribution among their creditors. Now this seems to me to be clearly an offence under the Insolvency Act such as is referred to in section 39 of the Act. It is an offence for which a penalty amounting to imprisonment for a term of two years is provided under the provisions of section 103 of the Insolvency Act. I, therefore, have no option in the matter so far as the discharge is concerned, because section 39 distinctly says that the Court shall refuse the discharge in all cases where the insolvent has committed an offence under the Act. I think it is clear that the insolvents have committed an offence under the Act, and, therefore, under the provisions of section 39, I am bound to refuse the application for discharge. I now have to deal with the application for the annulment of the adjudication. This seems to be a case in which I ought certainly to annul the adjudication. It seems to me to be a very bad case. Here you have two insolvents adjudicated on their own petition, guilty of an offence under the Insolvency Act in preferring an old creditor with what object except to advantage themselves in some way it is difficult to say. They have got no books of account, and so far as I can see, they seem to me to be seeking to take advantage of the provisions of the Insolvency Act in order to shelter themselves from such proceedings as the creditors may be advised to take against them. I am not prepared to allow the provisions of the Insolvency Act to be used for any purposes of that kind. I accordingly annul the adjudication order of 5th March 1915. The creditor is entitled to costs of this application out of the assets, (if any), belonging to the insolvent in the hands of the official Assignee.

The insolvent appealed against the above judgment.

Messrs. A. N. Chowdhry and *B. C. Ghose* for the Appellants (insolvents).

Mr. P. N. Chatterjee for the Respondents.

The following judgments were delivered by the Court:

ember, 17.

Sanderson, C. J.—This is an appeal from a judgment of Mr. Justice Greaves which was delivered on the 14th day of March in this year.

The appeal was based upon two grounds: *first*, that the learned Judge had refused an order to discharge the insolvents: and, *secondly*, that he had made an order annulling the adjudication in insolvency.

The learned counsel who appeared for the insolvents, the appellants, has not pressed the first ground. Therefore, it is not necessary for us to say anything about it.

The point which has been argued is the second one, namely that the learned Judge ought not to have made an order annulling the adjudication.

The argument is based upon two grounds. *First*, it is argued that the learned Judge had no jurisdiction to make the order: *Secondly*, that if he had jurisdiction he ought not to have exercised it in the way in which he did, namely, by making an order of annulment.

The facts in this case are somewhat peculiar: It appears that the appellants, the insolvents, were adjudicated bankrupt as long ago as the 25th of June 1906. On the 7th August 1906 they obtained their personal discharge. But there never was any final discharge, and apparently, those proceedings seem to have got into abeyance by the consent of all parties concerned. Then, on the 12th December, 1912, the appellants again presented a petition, and upon that petition they were again adjudicated insolvents. The debts of the respondent creditors had been incurred before December 1912. I do not know the exact date, but it was certainly before the date of the second insolvency. On the 2nd of February, 1915, over two years after the adjudication the official Assignee applied to the Court for the annulment of the adjudication, on the ground that the rules of the Court had not been complied with: and, the particular rules in question was rule 142 A which provides "where an insolvent does not apply to the Court for his discharge under section 38 of the Act for a period of eighteen months from the date of the order of adjudication, the Court on the application of the Official Assignee or of a creditor may annul the adjudication or make such order as it may think fit."

An application was made under that rule, and the learned Judge who heard the application made an order annulling the adjudication. Therefore the second insolvency came to an end by the order of the Court. Seven days after the adjudication was annulled, the creditors, the respondents in this appeal, brought a suit against the debtors: and, on the 22nd of Februaiy a notice of the suit was issued and served upon the debtors. On the same date the debtors began to take steps with a view to the presentation of another petition in

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insolvency, and on that date they deposited the sum of Rs. 50 with the Official Assignee. On the 5th of March, the debtors presented their third petition, and an adjudication was made on the same day. On the 13th of March the creditors, the respondents in this appeal, put in a petition asking that this order of adjudication should be annulled. The proceedings then apparently came before Mr. Justice Chaudhuri, and at his suggestion, an application was made by the debtors that the order of the 2nd of February 1915 annulling the adjudication should be reviewed. The learned Judge heard the application for review and came to the conclusion that there was no ground to justify him in reviewing the order, and he dismissed the application. The result was that the order of the 2nd of February 1915 annulling the second insolvency stood.

Then the matter came before Mr. Justice Greaves, and an application was made to him by the debtors for their discharge, which he refused, and that point, as I have already said, has not been argued in this appeal. An application was made by the creditors, the respondents in this appeal, that the adjudication of the 5th of March should be annulled.

The learned Judge came to the conclusion that the order of adjudication ought not to have been made, and he set it aside. The grounds upon which he based his judgment were as follows: "Here you have two insolvents adjudicated on their own petition, guilty of an offence under the Insolvency Act in preferring an old creditor with what object except to advantage themselves in some way it is difficult to say. They have got no books of account, and so far as I can see, they seem to me to be seeking to take advantage of the provisions of the Insolvency Act in order to shelter themselves from such proceedings as the creditors may be advised to take against them."

Now, it is not necessary for me to say whether I entirely agree with the ground on which the learned Judge based his judgment, for I think that the appeal ought to be dismissed on another ground altogether. It is admitted that the application for the third adjudication order viz that of the 5th of March, 1915 was made on the same materials as the application for the second adjudication order. The debts were the same; the creditors were the same and, the learned Judge has treated the third insolvency and the second insolvency practically as one insolvency. The learned counsel who argued this appeal has not disputed that that was in fact a fair way of looking at it. Then the result is this, that on the 2nd of February 1915, an order was made by this Court putting

an end to the insolvency, and then on the 5th of March, practically a month afterwards, an order was made adjudicating the debtors insolvent. There was no difference in the circumstances—the same debts, the same creditors; and, the application was made on the same materials as the application for the second insolvency. The question arises whether the learned Judge in these circumstances had jurisdiction to make an order annulling the adjudication. In my opinion he had. The section under which he acted was section 21 which provided that "where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debtors of the insolvent are paid in full, the Court may, on the application of any person interested, by order annul the adjudication. These words are in effect the same words which were used in the English Bankruptcy Act of 1883, section 35. In the case, *ex parte Painter* (1) it was held that the Court had jurisdiction under that Act to make the order of annulment, if it thought that the application for bankruptcy was made as an abuse of the process of the Court: or, to use the orders of the learned Judge Mr. Justice Vaughan "for a purpose foreign to the Banckruptcy Laws." I am of opinion that the learned Judge in this case had jurisdiction to make the order, if he thought that the application for the third insolvency was an abuse of the process of the Court. Now, was it an abuse of the process of the Court under the circumstances of this case? I listened with great attention to the learned argument of the learned counsel, and the main part of his argument was that a debtor, if he comes to the Court and shows that he is unable to pay his debts, is entitled for his protection, to get adjudication in insolvency. Therefore, I put to him, in order to test the principle, whether, if, on the 2nd of February, 1915, an order was properly made annulling the order of adjudication in insolvency, the same debtor could come to the Court on the following day on exactly the same facts, alleging that he was unable to pay his debts and was entitled to an order of adjudication in insolvency. The learned counsel was not prepared to argue that he was. Then I ask what is the difference in principle if the second order is made on the 5th March instead of the day following the 2nd February: provided no new circumstances have arisen; I see no difference: In this case no new circumstances had arisen between the 2nd of February and the 5th of March. In my judgment the learned Judge was right in annulling the adjudication in insolvency.

(1) (1895) 1 Q. B. 85 (91).

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But, the point with which I have now been dealing, was not apparently taken before Mr. Justice Greaves—certainly it is not referred to in his judgment—and it was only argued at a late period of this appeal : and, in these circumstances I think that the appeal must be dismissed without costs.

Mookerjee, J.—I agree that the order of Greaves, J. must be maintained, though not on the grounds assigned by him.

The order was made for annulment of an adjudication under section 21 (1) of the Presidency Insolvency Act, 1907, which provides that where, in the opinion of the Court, a debtor ought not to have been adjudged an insolvent, the Court may, on the application of any person interested, by order annul the adjudication. Whether a debtor ought or ought not to have been adjudged an insolvent must obviously be determined with reference to the point of time when the order of adjudication was made. Section 14 defines the conditions on which a debtor may present a petition for insolvency. Sub-section (1) of section 15 then lays down that a debtor's petition shall allege that the debtor is unable to pay his debts ; and if he proves that, he is entitled to present a petition, that is, if he establishes the conditions, mentioned in section 14, the Court may thereupon make an order for adjudication, unless, in its opinion, the petition ought to have been presented before some other Court having insolvency jurisdiction Consequently, if the debtor alleges and proves that he is unable to pay his debts and that his debts amount to Rs. 500, he is *prima facie* entitled to an order of adjudication. In the present case, it is not disputed that the debts amount to upwards of Rs. 500, and the debtors are unable to pay their debts. Consequently the order of adjudication was *prima facie* properly made. But it is urged that the order of adjudication should not have been made, because the application whereon it was obtained was in essence an abuse of the process of the Court. This raises the question whether it is obligatory upon a Court to grant an application in insolvency merely because the debtor satisfies the Court that the conditions mentioned in sections 14 and 15 exist in his case.

Under the law of England it is well settled that when the presentation of a petition is an abuse of the process of the Court, the Court may decline to make any order on it or may rescind the receiving order made on the petition. This principle was recognized in the cases of *In re Belts* (1) ; *In re Painter* (2) ; *In re Hancock* (3) ; *Re. Archer* (4) ; and has been applied by all the Indian High

(1) (1901) 2 K. B. 39. (2) (1895) 1 Q. B. 85.
(3) (1904) 1 K. B. 585. (4) (1904) 20 T. L. R. 390.

Courts. It was indicated as applicable to the Provincial Insolvency Act in the case of *Samiruddin* v. *Kadumoyi Dasi* (1); and has been recently accepted by two Full Benches, one of the Madras High Court, the other of the Allahabad High Court, in the cases of *Ponnusami Chetti* v. *Narasimma Chetti* (2); and *Triloki Nath* v. *Badri Das* (3); [See also *In re Sabhapathy* (4)]. We must take it then as well settled that notwithstanding proof of the existence of the conditions mentioned in the statute, the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court; and it is the duty of the Court to have regard to this aspect of the matter when the question is raised. Let us consider the position of the appellants from this point of view.

In the case before us, the appellants applied for adjudication under the Indian Insolvency Act, 1848 on the 25th June 1906. They obtained an order in their favour as also an order for final discharge on the 7th August 1906. This proceeding appears to have been subsequently abandoned, under circumstances which have not been explained, on the 2nd December 1912; after the Presidency Towns Insolvency Act had come into operation, they again applied to be adjudged insolvents. It may be mentioned here that in the interval their circumstantaces had materially altered; apparently, the amount of their debts, as also the number of their creditors, had increased.

The order for adjudication was made as a matter of course; but no steps were taken for the payment of the dues of the creditors. The consequence was that on the 2nd February 1915 an application was made to the Insolvency Court by the Official Assignee for an Order under Rule 142 (a) of the Rules of the Court. This rule provides that where an insolvent does not apply to the Court for his discharge under section 38 of the Act for a period of 18 months from the date of the order of adjudication, the Court, on the application of the Official Assignee or of a creditor, may annul the adjudication or make such order as it may think fit. The Court granted the application of the Official Assignee and the adjudication order was annulled. On the 9th February, 1915, the respondents who are the principal creditors of the appellants instituted a suit to enforce their claim and the summons was served shortly afterwards. The result was that on the 5th March 1915, the appellants again made an application to be adjudged insolvents. The application recited the previous history in this matter, and the Court

(1) (1910) 12 C. L. J. 445.
(2) 1913) 25 M. L. J. 545.
(3) (1914) I. L. R. 36 All. 250.
(4) (1897) I. L. R. 21 Bom. 297.

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made the order for adjudication as a matter of course. On the 13th March, 1915, the creditors made an application under section 21 for annulment of the order of adjudication. In my opinion, there is no escape from the conclusion that the application of the 5th March, 1915 was an abuse of the process of the Court. It is admitted that there had been no change whatever in the circumstances of the petitioners; in fact the allegations whereon the application of the 2nd December 1912 was based were absolutely identical with those mentioned in the application of the 5th March 1915. If an application of this character were entertained, the result would be inevitable that an insolvent would be encouraged to make an application for insolvency, to obtain an adjudication order, to take no substantial steps thereafter, or to abandon the proceedings, and, when pursued by his creditors again, to seek relief in the insolvency Court, whenever convenient to him. It would be lamentable if the Court were to countenance conduct of this character or to encourage litigants to trifle with the Court in this manner. In the case before us, the order for annulment was properly made on the 2nd February 1915; there is no suggestion that the rule was improperly applied; and we have the significant fact that the order was confirmed on review. If, then, the order of the 2nd February 1915 stands, it is difficult to see how the application of the 5th March, based on no fresh materials could be properly maintained. On these grounds I hold that the order of Greaves J. must be supported.

But I desire to make it perfectly clear that I do not accept the view which appears to have commended itself to Greaves J., namely, that an adjudication order may be properly annulled under section 21 on the ground that the insolvent has shown undue preference to one creditor and has thus misconducted himself. This is not a ground on which an adjudication order can be legitimately refused but is a matter to be taken into consideration only at a later stage of the proceedings in insolvency; this view was adopted in the cases of *Samiruddin* v. *Kalumoyi Dasi* (1); *Uday Chand Maity* v. *Ram Kumar* (2); *Triloki Nath* v. *Badri Das* (3) and *Ponnusami* v. *Narasimma* (4).

As regards costs, I am inclined to take the view that the respondents are not entitled to their costs in this Court. The ground on which they now succeed was not urged in the Court below and was put forward in this Court only at a late stage of the argument

(1) (1910) 12 C. L. J. 445.
(2) (1910) 12 C. L. J. 400.
(3) (1914) I. L. R. 36 All. 250.
(4) (1913) 25 M. L. J. 545.

after all the facts had been investigated. The appeal will therefore be dismissed without costs.

Babu Akhil Chandra Bose:—Attorney for the Appellant.

Mr. S. M. Dutt:—Attorney for the Respondent, Gopal Chandra Ghosal.

A. T. M. *Appeal dismissed.*

CIVIL. 1916. Malchand v. Gopal. *Mookerjee, J.*

Before Sir William Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot.

RAJA SREENATH ROY AND OTHERS.*

v.

RAJA PEARY MOHAN MOOKERJEE.

CIVIL. 1896. *January, 8.*

Promissory note—Principal debtor—Surety—Guarantee—"On demand"—Indian Limitation Act (XV of 1877) Secs. 65, 83, 115, 120,—Indian Limitation Act (XIV of 1859) Sec. 9—Negotiable Instruments Act (XXVI of 1881) Sec. 74.

X borrowed money from A on a promissory note payable on demand with interest at a specified rate. Y as surety guaranteed repayment of the loan :

Held, that a promissory note payable on demand is a present debt payable without any demand, even though interest has been reserved. On such a note the liability of the surety arises simultaneously with that of the debtor, that is, with the making of the advance.

Held, (by Hill J.) that a suit against the surety is governed by Art. 65 of the Limitation Act, 1877.

Held, (by the Court of Appeal overruling Hill, J.) that a suit against the surety is governed by Art. 115 of the Limitation Act, 1877.

Art. 115 is not limited to suits for damages for breach of contract but includes suits to enforce liability under simple debts due.

Appeal by the plaintiffs.

Suit for money.

The plaintiffs instituted this suit on the 7th May, 1892 against the representatives of one Syamadhan Mookerjee who had borrowed from them Rs. 15,000 on a promissory note on the 14th August 1886. They also joined as defendant Raja Peary Mohan Mookerjee who had guaranteed the repayment of the loan. The promissory note was in these terms :

* Appeal from original civil No. 30 of 1895 from the decree of Mr. Justice Hill dated the 15th May, 1895 in original suit No. 282 of 1892.

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"On demand I promise to pay Babu Srinath Roy of No. 68, Sovabazar Street in the town of Calcutta or order at Calcutta the sum of Rs. 15,000 only, with interest thereon at the rate of 18 per cent. per annum from the date hereof up to realisation for value received in notes.

Calcutta;
14th August 1886.

Syamadhan Mookerjee."

The letter of guarantee was in the terms :—

"Dear Sir,

I am very thankful to you for your having agreed to lend a further sum of Rs. 15,000 to my relative Babu Syamadhan Mookerjee. The money has been to-day paid to him in my presence by Babu Jadab Chander Dutt, M. A. If there be a default in the repayment of the loan, you may look to me for repayment.

Calcutta;
14th August 1886.

Yours very faithfully,
Peary Mohan Mookerjee."

On the 27th June 1889 the principal debtor paid Rs. 5,000 and the fact of the payment was endorsed by the debtor on the back of the promissory note; three other payments had been made by the debtor on earlier dates.

The suit was instituted on the 7th May, 1892 against the principal debtor and surety for recovery of Rs. 8,398-10-6. The surety resisted the claim on the ground that it was barred by limitation. The case was heard by Mr. Justice Hill on the 17th and 18th April 1895. On the 15th May, 1895, the learned Judge pronounced judgment holding that the claim was barred against the surety and that a decree could be made only against the representatives of the principal debtor.

The following judgment was delivered by

1895.
May, 15.

Hill, J.—The defendants from 1 to 6 inclusive are sued as the representatives of one Syamadhan Mookerjee, deceased, upon a promissory note made on the 14th August 1886 for a sum of Rs. 15,000 with interest at the rate of 18 per cent per annum. The note was payable on demand and the amount now claimed thereunder is Rs. 8,398-10-6.

The 7th defendant is sued on a guarantee given by him for the payment of the amount of the note.

So far as the estate of Syamadhan Mookerjee is concerned the suit is practically undefended; the note is admitted and payments in respect of interest have been proved, which bring the suit well

within the period of limitation, so that there must at all events be a decree for payment of the amount claimed out of the estate of Shamadhone Mookerjee, liberty being reserved to the plaintiffs to apply for administration of that estate should it be necessary. But it is contended for the 7th defendant (the fact of the guarantee having been given not being disputed) that as against him the suit is barred by limitation. The plaintiffs contend, in the other hand, that the liability of a surety being co-extensive with that of the principal debtor the liability of 7th defendant still subsists, since that of the estate of Shamadhone Mookerjee has been kept alive by reason of the payments of interest mentioned above. Forbearance to sue the principal has not, it was urged, the effect of discharging the surety and so long as a suit may be maintained against the principal it may be maintained equally against the surety.

There is not, so far as I am aware, any reported case in which the precise question thus raised has been decided. But having given the matter some consideration it appears to me that the defendant's contention must prevail.

In the first place the contract of guarantee is a contract between the creditor and surety, to which the principal debtor is not a party. There is no privity between the surety and the principal debtor. The liability of the surety arises immediately on the failure of the principal debtor to perform his obligation and if the surety then likewise fails in performance a right of action as against him immediately accrues to the creditor, and as the contractual liability of the surety is independent of that of the principal, so the right of action accruing to the creditor in breach of the surety's contract must also be independent. Then I take it there can be no question that the remedy against the surety may become barred by limitation. We find that stated to be one of the ways in which a surety may be discharged in De Colyar on the Law of Guarantees at page 404. "Supposing" it is there said, "none of the contingencies which have now been enumerated happen to the suretyship, it will, in process of time like other contracts and rights, become extinguished by the operation of the law of Limitation,' and then a little further on the law is stated to be that in the case of a guarantee not under seal after six years have elapsed from the period at which the surety first became liable to make payment to the creditors the right of the creditor to compel him to do so will be barred by 21 Jac. J. C. 16 S. 3. So again in Darby and Bosanquet on the statutes of Limitation p. 32 it is said "as between the creditor and the surety the statute runs in favour of the surety as soon as he

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becomes liable to make a payment to the creditor." The authorities cited by the learned authors for these statements of the law are the same. I have looked into them and find that their effect has been correctly given, and I think it unnecessary to say more with regard to them save that in none of them was it suggested that the period within which the remedy against the surety might be enforced was in any way dependent upon the state of things subsisting between the creditor and the principal debtor in respect of the enforcement of the right of action against the latter. The question was in each case when did the right of action against the surety accrue? Now turning to the Indian Statute of Limitations, it is provided by section 4 as follows, "subject to the provisions contained in sections five to twenty-five (inclusive) every suit instituted, appeal presented and application made after the period of limitation prescribed therefor by the second schedule hereto annexed shall be dismissed, although limitation has not been set up as a defence." Is there then a period of limitation prescribed for a suit by the creditor against a surety on his guarantee? Although the 2nd schedule does not anywhere provide in express terms for a suit of that nature it has I think been generally understood that article 65 applies to such a suit. It prescribes a period of three years from the happening of the contingency on the occurrence of which the promise was to be performed for breach of which the suit is brought.

Then is there anything to be found in the sections of the Act from section 5 to section 25 which could be construed so as to enable the principal debtor by dealings between himself alone and the creditor to enlarge or otherwise affect the running of the period prescribed for an action against the surety. I can find nothing of that kind, and I think Mr. O'kinealy's contention on this point is a forcible one, namely that section 21 indicates the only cases in which and the conditions under which the legislature allows the running of the period as against one person to be affected by the acts of another person and certainly the case of principal debtor and surety is not one provided for by the section, (and see remarks of Westropp C. J., I. L. R. 5 Bom. p. 652). It appears to me therefore that the right of action having once accrued as against the surety the period of limitation for an action against him cannot be extended or otherwise affected by payments merely whether of interest or of principal made by the principal debtor.

The language of section 128 of the Indian Contract Act upon which reliance was placed by the plaintiff was I think intended to

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provide for the contractual obligations of the surety, but is not concerned with the enforcement of the right of action accruing to the creditor on breach. The case of *Hajarimal* v. *Krishnarav* (1), which was approved in this Court in the case of *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi* (2), shows that the remedy against the surety may continue, notwithstanding that the remedy against the principal debtor has become barred by limitation and would seem therefore to support this view.

Nor do I think that section 137 of the Contract Act helps the plaintiff "mere forbearance to sue" means there, in my opinion, as was held in *Radha* v. *Kinlock* (3) forbearance while the creditor enjoys the right to sue but though such a forbearance may not have the effect of discharging the surety there is nothing in the section which prevents the statute of limitation from running in his favour. Section 137 was I think intended as was said in *Radha* v. *Kinlock* (3) to be "more a section by way of explanation and to prevent misconception as to the effect of section 135 than a variation of the rule of law enunciated in section 134."

The question then remains when did the liability of the surety arise in the present instance. When did the "contingency" of Art. 65 happen? The guarantee is simply to pay on default made by the principal debtor without any qualifying stipulation and the guaranteed debt is a debt on a promissory note payable on demand. A promissory note payable on demand is a present debt payable without any demand. And it makes no difference that interest has been reserved [see *Norton* v. *Ellam* (4); and *In re George* (5)]; such a note is "at maturity" as soon as given, and the loan on the note in the present instance having been advanced on the strength of the guarantee I think therefore that the liability of the 7th defendant thereunder arose simultaneously with the making of the advance. That was on the 14th August 1886, and this suit which was not instituted until the 7th May 1892, is I think therefore barred as against the 7th defendant. As against him accordingly the suit must be dismissed with costs on scale No. II.

The plaintiff is entitled to his costs as against the first class of defendants on the same scale.

The plaintiffs appealed. The appeal was heard by Petheram, C. J., Prinsep and Pigot JJ.

(1) (1881) I. L. R. 5 Bom. 647.
(2) (1885) I. L. R. 12 Calc. 330.
(3) (1889) I. L. R. 11 All. 310.
(4) (1837) 2 M. W. 461; 45 R. R. 545.
(5) (1890) L. R. 44 Ch. D. 627.

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January, 8.

Messrs. Woodroffe, Evans, Apcar and *Bose* for the Appellants.

Messrs. Pugh and *O'kinealy* for the Respondent.

The judgment of the Court was delivered by

Pigot, J.—This suit is brought against the defendants Nos. 1 to 6 as representatives of Shamdhone Mookerjee upon a promissory note for Rs. 15,000, made payable on demand, dated the 14th August, 1886. The amount claimed is Rs. 8398-10-6. There is no doubt that that amount is due on the note and the suit was practically undefended, so far as the defendants Nos. 1 to 6 were concerned. The 7th defendant, the respondent was sued upon a letter of guarantee made by him in favour of the plaintiff in the following terms:

"I am very thankful to you for your having agreed to lend a further sum of Rs. 15,000 (fifteen thousand) to my relative Babu Shamdhone Mookerjee. The money has been to-day paid to him in my presence by Babu Jadabchander Dutt, M.A. If there be a default in the repayment of the loan you may look to me for repayment."

The original Court held the suit barred by imitation, holding that article 65 of the Limitation Act (Act XV of 1877) applied; and the plaintiff appeals on the ground that the suit against defendant No. 7 is not barred by limitation.

The plaint states and the fact is, that the payment of sum claimed was demanded from the defendants Nos. 1 to 6 in January 1892, and, on their default, demand was made on defendant No. 7 on the 23rd January 1892, and payment was refused by him.

It is admitted by the learned counsel for the appellant that on a contract of guarantee, such as the present, it is not necessary, according to English law, to give notice, but the guarantor may be sued on at once.

But it is said that, in this case, you must look at the intention of the parties; that the real contract must be looked to, and that in this case the intention was to pay when, and in case, default should take place, and only in case of default.

But, in the first place, the language of the guarantee importing such intention does not really create any liability in the case other than that of an ordinary guarantee, and the rule as to an ordinary guarantee on a demand note or of a debt payable on demand is admitted and is clear according to English law, which must be administered in this Court on the original side; and that the

guarantee was made on the demand note and executed in respect of it, is not open to question in the case.

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But even assuming that the supposed intention is to be a guide in dealing with this matter, assuming that such an intention was manifested in the guarantee, still in this case the note was not presented for payment of such residue as remained due upon it for five and a half years after its execution.

It is true that the rule as to reasonable time necessary for the presentation of a note payable on demand which is the same in section 74 of the Negotiable Instruments Act and in the English law, is not, with respect to an instrument intended to be a continuing security, to be enforced with extreme stringency—an example of which is to be found in *Chartered Mercantile Bank* v. *Dickson* (1). But in the present case it would not be in our power to infer that, upon the terms of the guarantee, as made, the intention could be imputed to the defendant to remain indefinitely liable for whatever amount might be due in respect of the demand note after such a period as elapsed in the present case before demand was made; confessedly, if the period of limitation did not begin to run at the time of the execution of the guarantee, there is no other period from which it could begin to run until the refusal in January 1892, five and a half years after the execution of the guarantee.

So far as to the argument as to intention; and in truth the question in this case is as to whether or not any article of the Limitation Act now in force applies other than article 120. Article 65 which the learned Judge was of opinion applied to the case, we are unable to think does apply. That is for compensation for breach of a promise to do anything at a specified time or upon the happening of a specified contingency, and the time from which the period begins to run is when the time specified arrives or the contingency happens. We are unable to say that the terms of that article apply to the present case. The obligation certainly arose *uno-flatu* with the execution of the document, and there is no contingency to be found in the case. In short, the suggestion that article 65 applies would involve the assumption that a claim could not be made on the guarantee until after default had been made on demand by the person guaranteeing.

Article 83 we need not consider, but article 115 is the article which was chiefly considered before us: it was contended that that article could not apply to the present case, and if it could not, the

(1) (1871) L. R. 3 P. C. 574.

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case would fall within article 120, and limitation would not bar the claim in this suit. We think that article 115 applies. It was said that that article does not apply in that breach of contract is not a term under which the present case could be brought. It was contended that article 115 only applies to cases where the obligation arises at a time subsequent to the making of the contract; but no authority was cited to us which supports this proposition. The description of suit to which the article applies, is, to use the language of the article, "for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for," and the time from which limitation begins to run is, "when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs." Now, whatever might be supposed, at first sight, on reading the language of that article, it is clear, upon the authorities, that it is not limited to the case of damages for breach of contract, and that it is applicable to a case of liability under a simple debt due, a liability such as, under the old law, was discussed by Mr. Justice Macpherson in a case cited by Mr. Pugh in reply, [*Parbatty* v. *Ramnarayan* (1)] a liability such as is spoken of by their Lordships of the Judicial Committee of the Privy Council in referring to the Indian decisions on the words of the old Act of 1859 in the case of *Dukur Pershad* v. *Foolcoomaree* (2). The words of the old Act (Act XIV of 1859, section 9) are, "suits brought to recover money lent or interest or for the breach of any contract," and it is clear, we think, upon the language of that decision, that so far as that case goes, it is an authority for the proposition that the words in the old Act of 1859, similar to those in article 115 of the present Act, are applicable to the case of a debt due.

In the present case, this is the nature of the obligation that arose against the defendant immediately on the execution of the guarantee, and we think that limitation ran from that date, and that therefore the suit was barred under section 115 and that the appeal must be dismissed with costs.

D. K. R. *Appeal dismissed.*

(1) (1870) 5 B. L. R. 396.

(2) (1871) 16 W. R. 35 P. C.; 14 M. I. A. 134.

APPELLATE CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

MOHIM CHANDRA DEB CHOWDHURY AND OTHERS *v.* PYARI LAL DAS AND ANOTHER.* CIVIL. 1916. May, 30.

Limitation—Sale for arrears of Government revenue—Symbolical possession—Adverse possession of estate—Encumbrance—Assam Land and Revenue Regulation (I of 1886), Secs. 63, 67—Limitation Act (IX of 1908), Sch. I. Arts 121, 142.

On the 22nd July, 1909, the plaintiffs instituted a suit to recover possession of certain land on the strength of title by purchase at a sale for arrears of revenue held on the 7th September, 1895 under section 70 of the Assam Land and Revenue Regulation. The sale was confirmed on the 22nd November, 1895, the sale certificate was granted on the 8th October, 1896 and symbolical possession was given to the plaintiffs on the 22nd July, 1897. The defence *inter alia* was that the land in question was held by the defendants as appertaining to another estate and not to the estate which the Government was selling, that the land had been in their possession from a time anterior to the revenue sale of taluk which was the root of the title of the plaintiffs, that the defendants were encumbrancer, and that the suit was barred by Art. 121 of the Limitation Act:

Held, that the defendants were joint proprietors of the taluk purchased by the plaintiffs, that they were defaulters within the meaning of section 67 of the Assam Land and Revenue Regulation, and that they held no incumbrance which the plaintiffs were called upon to annul by the institution of a suit within the period prescribed by article 121 of the Limitation Act.

Mahomed Nosim v. *Kashi Nath* (1) distinguished.

That the suit was governed by article 142 of the Limitation Act and time ran against the plaintiffs from the date when possession was delivered to them.

Mozuffer Wahid v. *Abdus Samad* (2) followed.

Appeal by the Defendants.

The material facts are set forth in the judgment.

The primary Court dismissed the suit. The Court of first appeal decreed the suit. The appeal to the High Court was dismissed by Mr. Justice Sharfuddin by the following judgment

Sharfuddin, J.—The present appeal is on behalf of the representatives in interest of defendant No. 5 and on behalf of defendant No. 10. 1913. July, 9.

* Letters Patent Appeal No. 98 of 1913, against the decision of Mr. Justice Sharfuddin, dated the 9th July, 1913 in Appeal from Appellate decree No. 1777 of 1911 against the decree of Babu Aswini Kumar Bose, Subordinate Judge, 1st Court, of Sylhet, dated the 31st March, 1911, modifying that of Babu Romesh Chandra Sen, Munsiff, 1st Court, at Habiganj, dated the 15th August, 1910.

(1) (1898) I. L. R. 26 Calc. 194. (2) (1880) 6 C. L. R. 539.

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The plaintiff's case is that the land in suit appertains to taluk No. 12, Shibaram, which was sold for arrears of revenue and purchased by the plaintiff No. 1 on 7th September 1895, which sale was confirmed on 22nd November 1895 and the delivery of possession followed on 22nd July, 1897. Three other persons *viz.* Kantu Mohan Roy, Santosh Roy and Kunja Mohan Roy had four annas share in the land jointly with the plaintiff No. 1. These three other persons conveyed that share to the plaintiff No. 2. The plaintiffs further allege that the defendants were the defaulting proprietors of the land in suit who have been in wrongful possession of that land and have kept the plaintiffs out of it, the plaintiffs, therefore, instituted the present suit for recovery of possession of the land in suit and for mesne profits for the years 1313 to 1314 B. S.

For the purposes of the present appeal this Court is concerned with only some of the objections raised by the defendants and they are these:—(1) That the defendants are not the defaulting proprietors of the taluk Shibaram and its purchase by the plaintiffs is subject to defendants' encumbrances. (2) That the land in suit appertains partly to Haria Kandi and partly to Shasthirpur which lies to the north of Haria Kandi and is separated by a ridge and that the land lying to the north of the said ridge appertains to taluk No. 1, Adam Raja and that the land lying to the south of it appertains to taluk No. 6 Durga Ram.

A Commissioner was appointed by the first Court who found that the land to the south appertained to taluk Durga Ram and that to the north appertained to the plaintiff's taluk Shibaram. This finding by the Commissioner has been accepted by the lower appellate Court as correct.

The defendants also allege that they were in adverse possession of the land in suit for over 12 years against the proprietors of the estate sold.

The first Court held that the defendants 5 and 10 had been in possession for more than 12 years adversely to the proprietor of the estate and hence the plaintiffs who were the purchasers of the estate at revenue sale could not claim recovery of possession as their claim was barred by the law of limitation.

The plaintiffs appealed to the lower appellate Court which held that although defendants Nos. 5 and 10 had acquired title by adverse possession, they, by the acquisition of their title were to be treated as defaulters and it further held that as such the period of limitation would begin to run against the plaintiffs from the date of delivery

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of possession which was within 12 years; that Court, on the above grounds, decreed the suit against defendants Nos. 5 and 10.

The above defendants have now appealed to this Court on the ground that the plaintiff's suit was barred by the statute of limitation and that the defendants should not have been treated as defaulters.

This suit was instituted in the Munsiff's Court of Habiganj which is in Sylhet and is therefore governed by the Assam Land and Revenue Regulation I of 1886 and not by the Bengal Sale Act XI of 1859.

Section 63 of the above Regulation provides as follows :—

"All persons who have been in possession of the estate or any part of it during any portion of the agricultural year in respect of which the revenue is payable" are jointly and severally liable for it. The above provision is clear. It seems to me that if a person is in possession of an estate or any part of it during any portion of the agricultural year, in respect of which the revenue is payable, he is jointly and severally liable for it; and it is immaterial whether he asserts that the land in question appertains to the taluk sold or to any other taluk provided he asserts that he is in possession of the whole taluk or any portion of it, adversely to the proprietors of the estate sold.

Section 67 of the same Regulation provides that "Land-revenue not paid on the date when it falls due *shall* be deemed to be an arrear; and every person liable for it shall be deemed to be a defaulter."

The question to be decided in the present appeal is this, viz., whether the defendants Nos. 5 and 10 are to be treated as defaulters respecting the arrears for the default in payment of which the sale took place.

From the finding, which is a finding of fact, of the lower appellate Court it appears that the appellants had perfected their title by adverse possession for more than 12 years before the present default took place and the finding to that effect is as follows :—

"They (defendants) had been in possession of that land adversely for more than 12 years, from before the default in payment of the revenue for which the disputed taluk was sold." The defendants, by adverse possession for more than 12 years had perfected their title as proprietors to the extent of their possession. That being so they had become for all intents and purposes rightful proprietors of the estate to the extent of their possession, before the default occurred and as such proprietors, the defendants, under the Regulation abovementioned, were liable jointly and severally to pay the revenue.

The present case is governed by the Assam Land and Revenue Regulation and not by the Bengal Sale Act No. XI of 1859.

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The defendants by their adverse possession had become proprietors of the estate in question to the extent of their possession and under the Regulation they were jointly and severally liable to pay the government revenue. They failed to do so and whatever right they had acquired by adverse possession was swept away by the sale. When I was about to dictate a judgment in the present appeal, I was informed by the learned pleader for the appellants that there was an appeal before Richardson and Newbould JJ. in which a similar point had arisen and that I should await the learned Judge's decision in that appeal. The decision has been given in that appeal and I find that that was a case under section 53 of Act XI of 1859 and had nothing to do with the Assam Regulation and besides the facts are different. Under the above circumstances the decision of those learned Judges does not help me in the present appeal.

For the above reasons I am of opinion that the judgment of the lower appellate Court is correct and unassailable. I, therefore, dismiss this appeal with costs.

Against this decision, the defendants appealed under section 15 of the Letters Patent.

Babu Kumar Sankar Roy for the Appellants.

No one appeared for the Respondents.

The judgments of the Court were as follows :

May, 30.

Sanderson, C. J.—This is a case in which we had the benefit of a very able and learned argument on behalf of the appellant, but I do not think myself that there is very much difficulty in the case : and, further than that, I think it is directly covered by authority. In the Court of first instance the suit was dismissed. The learned Judge of the first appellate Court decreed the suit, and Mr. Justice Sharfuddin affirmed that judgment.

The suit was brought for possession of certain land. The plaintiffs bought at a sale held by the Government for arrears of revenue. The material dates were as follows :—the sale was on the 7th of September 1895 ; the sale was confirmed on the 22nd of November 1895 ; the certificate was on the 8th of October 1896, and symbolical possession was given to the plaintiffs on the 22nd of July 1897. The suit was brought on the 22nd of July 1909, just within twelve years after the date when symbolical possession was given to the plaintiffs.

Two points arise in this case : the first one, upon the meaning of section 63 of Regulation I of 1886, (the Assam Land and Revenue Regulation, 1886), and, *secondly*, whether the plaintiff's claim is barred by the statute of Limitation. Section 63 says, "Land-revenue

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payable in respect of any estate shall be due jointly and severally from all persons who have been in possession of the estate or any part of it during any portion of the agricultural year in respect of which that revenue is payable." It has been found as a fact that the land in question was part of the estate which was sold by the Government in respect of the arrears of revenue. But it was alleged by the learned vakil for the appellants that it was held by the defendants as appertaining to another estate and not to the estate which the Government was selling. I ought to have mentioned that the defendants' claim to the title to this land was based upon adverse possession for more than twelve years. Now, as I have said it has been found that the land in question was part of the estate which had been sold and it cannot be denied that the defendants were also in possession of that part of the estate, and they were in possession of that part of the estate by reason of the adverse possession which they had had for over twelve years.

Now, having regard to what was said by the learned vakil in his argument, *viz.*, that if we were to decide this case in favour of the plaintiffs, we should be deciding that the ordinary occupancy tenant could be liable for the revenue. I wish to say quite distinctly that I am now deciding this case upon the facts of this case, not intending to cover any other case of different facts. The facts are that the defendants were in possession of the property claiming to be owners thereof by reason of adverse possession for more than twelve years: Now, as I read this section, the intention of the Legislature was that Government or the Revenue department should not have to go hunting up and down the country the persons who are liable to pay revenue, and therefore they provided that the revenue should be paid by all persons who have been in possession of the estate or any part of it during any portion of the agricultural year in respect of which that revenue is payable. As I have said it has been found that the property in question was part of the estate which was sold, and it cannot be denied that the defendants were in actual possession. To my mind, the case clearly comes within the meaning of that section and consequently the defendants became defaulters by reason of section 67 which says "Land-revenue not paid on the date when it falls due shall be deemed to be an arrear; and every person liable for it shall be deemed to be a defaulter." I do not really think that I should have taken the trouble to express my judgment at such length, except out of deference to the argument of the learned vakil for, I think the case is covered by the decision of my learned brothers Mr. Justice Mookerjee and Mr. Justice

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Richardson in the case of *Aftar Ali & others* v. *Brojendra Kishore Roy Chowdhuri* (1) which is unreported and which was referred to by my learned brother Mr. Justice Mookerjee during the course of the argument; and, it is in accordance with the conclusion at which I have arrived. The defendants being *defaulters* within the meaning of section 67, their interest in the land,—which they had acquired by adverse possession—was liable to be sold under section 70 of the same Regulation and that being so their title and interest passed to the plaintiffs who were purchasers at that sale. That disposes of the first point.

The only other question is whether the suit was brought within the time given by the statute of Limitation. There again, this matter is covered by authority, provided that the defendants were *defaulters* within the meaning of section 67. That authority is the case of *Mozuffer Wahid* v. *Abdus Samad* (2). The headnote there, is as follows: "Where land is sold under Act XI of 1859, for arrears of Government revenue, the purchaser who has been put in symbolical possession by the proclamation of the Collector, is entitled to sue for actual possession of the land within twelve years from the date of such symbolical possession." That exactly covers the point in this case. The reason upon which that judgment was based is to be found at the bottom of page 541, where it is said, "Under the Act the Collector was directed, in a certain case, to give possession by proclamation. He did in this case, by proclamation on the 3rd August 1864, give possession to the plaintiffs, and on the authority of the case quoted and upon general principles, we are of opinion that the proclamation was an act of possession by the plaintiffs, and that they are entitled to date their suit from the 3rd August 1864, and that inasmuch as they instituted their suit on the 17th July 1876 they are in time." Substituting the dates in this case for the dates which are given in the decision which I have just read, that is an authority directly in point, and I intend to follow that authority and hold that as long as the suit was brought within twelve years from the date upon which the Collector gave symbolical possession to the plaintiffs, the suit is brought within time. Inasmuch as it is not disputed that it was on the 22nd of July 1897 that the plaintiffs got symbolical possession and the suit was brought by them on the 22nd of July 1899, just within the twelve years, I think the suit was in time.

For these reasons I think that the appeal should be dismissed, but without costs, no one appearing for the respondent.

Mookerjee, J.—I agree that the decree awarded to the plaintiffs

(1) (1915) 24 C. L. J. 60. (2) (1880) 6 C. L. R. 539.

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by the Subordinate Judge which has been affirmed by Mr. Justice Sharfuddin, cannot be successfully assailed.

The plaintiffs seek to recover possession of the disputed land, on the strength of title by purchase at a sale for arrears of revenue held on the 7th September 1895 under section 70 of the Assam Land and Revenue Regulation, 1886. Under section 80, the sale became final on the 5th November 1895, though it was not confirmed till the 22nd November 1895. The sale certificate was granted on the 8th October 1896 and possession was delivered to the purchaser under section 85, on the 22nd July 1897. On the 22nd July 1909, the plaintiffs instituted this suit to recover possession of the land from the defendants on the allegation that it was comprised in *taluk* Shibram purchased by them on the 7th September 1895. The defendants resisted the claim on the ground that the land was comprised in their *taluks* Durgaram and Adamraja and had been in their occupation, from a time long anterior to the revenue sale of Taluk Shibram which was the root of the title of the plaintiffs. They also pleaded that the suit was barred by limitation. The Court of first instance dismissed the suit, upon appeal the Subordinate Judge decreed the suit in part, that is, in respect of lands found to have been included in Taluk Shibram; and his decree has been affirmed by Mr. Justice Sharfuddin.

On the present appeal, the defendants have contended that the suit is barred by limitation under article 121 of the schedule to the Limitation Act, inasmuch as they had been in adverse possession of the decreed lands for the statutory period, on the assertion that the lands were included in their property. Article 121 provides that a suit "to avoid incumbrances in an entire estate sold for arrears of Government revenue must be instituted within 12 years from the date "when the sale becomes final and conclusive." The contention of the appellants in substance is that as the sale became final and conclusive on the 5th November 1895, the present suit, instituted on the 22nd July 1909, is barred by limitation. This raises the question of the status of the defendants and the effect of the revenue sale on their rights. Mr. Justice Sharfuddin, in concurrence with the Subordinate Judge, has held that the effect of the adverse possession of the defendants, which had lasted for a period of more than 12 years before the date of the revenue sale, was to constitute them joint proprietors of *taluk* Shibram; they were consequently in the position of defaulting proprietors whose interest was swept away by the revenue sale. This conclusion has been controverted by the appellants who have argued that by adverse possession

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they had acquired the status merely of encumbrancer whose interest could be annulled only within 12 years from the date when the sale became final. In support of this contention, reliance has been placed upon the case of *Gocool Bagdi* v. *Debendra Nath Sen* (1) where the meaning of the term "encumbrance" as used in various statutes, more or less analogous to the Assam Land and Revenue Regulation, 1886, was discussed, as also to the decision in *Mahomed Nasim* v. *Kasi Nath Ghose* (2) where the effect of a sale for arrears of revenue under the Regulation was considered. In my opinion the contention of the appellants is not well-founded. The effect of the adverse possession of the defendants was, under section 28 of the Limitation Act, to extinguish the interest of the proprietors of *taluk* Shibram in the disputed land upon the expiry of the statutory period. The defendants thus acquired the proprietary interest in taluk Shibram with regard to the disputed land, although they professed to hold the land as an integral part of their property: *Gossain* v. *Issur* (3); *Jagrani* v. *Ganeshi* (4). In this view, the defendants were persons in possession of the taluk Shibram and were jointly liable to pay the Government revenue therefor. This follows from a plain reading of section 63 which provides that "Land revenue payable in respect of any estate shall be due jointly and severally from all persons who have been in possession of the estate or any part of it during any portion of the agricultural year in respect of which that revenue is payable." We are invited to place a narrow construction upon this section and to restrict its application to cases where the person in possession professes to hold the land as included in that estate. But I cannot read into section 63 words not to be found there, and I am not prepared to adopt the narrow construction put forward by the appellants. The result would be obviously anomalous, if that interpretation were accepted in the case where a proprietor of an estate might be dispossessed of all the lands of the estate; the consequence would be that though a person might be in adverse possession of the entire estate and might, by lapse of time, acquire a proprietary interest in that estate, yet, he would not be liable for payment of Government revenue. This unquestionably would not be consistent with the rules of justice, equity, and good conscience. If we next turn to section 67, we find that "Land-revenue not paid on the date when it falls due shall be deemed to be an arrear; and every person liable for it shall be

(1) (1911) 14 C. L. J. 136.

(2) (1898) I. L. R. 26 Calc. 194; 3 C. W. N. 108.

(3) (1877) I. L. R. 3 Calc. 224. (4) (1881) I. L. R. 3 All. 335.

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deemed to be a defaulter." Consequently, the effect of the adverse possession of the defendants was to constitute them joint proprietors of taluk Shibram. It follows, as a necessary corollary, that with the acquisition of that right, they also incurred the corresponding liability, namely, to pay Government revenue. This is the view which has been adopted by this Court in the cases of *Altar Ali and others* v. *Brojendra Kishore Roy Chowdhuri* (1); *Jitendra Kumar Pal Chowdhuri* v. *Mohendra Chandra Sarma* (2). It may be added that a similar view had been previously adopted with regard to the Bengal Revenue Sale Law (Act XI of 1859), in the cases of *Kumar Kalanand Singh* v. *Syed Sarafat Hossein* (3), and *Rahimuddi Munshi* v. *Nalini Kanta Lahiri* (4); and *Baikuntha Nath Rai Chaudhuri* v. *Basanta Kumari Dasi* (5). The case of *Mahomed Nasim* v. *Kasi Nath Ghose* (6) is plainly distinguishable. That case is an authority only for the proposition that the interest acquired by a subordinate tenure-holder in respect of lands not comprised in his tenure but annexed thereto by encroachment, is that of an encumbrancer; but it would be clearly inappropriate to describe as an incumbrancer a person who has acquired the status of a proprietor of an estate. I hold accordingly that the defendants were joint proprietors of the *taluk* purchased by the plaintiffs, that they were defaulters, and that they held no incumbrance which the plaintiffs were called upon to annul by the institution of a suit within the period prescribed by article 121.

The question next arises, by what article of the Limitation Act is the suit governed? It is plain that the rule applicable is embodied in Art. 142: Possession was delivered to the purchasers on the 22nd July, 1897; as the defendants did not quit the land, they must be deemed to have dispossessed the plaintiffs on that date, so that time ran against the respondents from then and not earlier. This view is supported by the decision in *Mozuffer Wahid* v. *Abdus Samad* (7) which was decided in 1880 and has been accepted as good law ever since: *Mir Waziruddin* v. *Lala Deoki Nandan* (8). I am not prepared at this distance of time to question its correctness or to treat the matter as *res integra*. It is plain that the question of limitation is concluded by authority, while the question of title is concluded by the concurrent findings of the lower Courts. The appeal must consequently be dismissed.

A. T. M. *Appeal dismissed.*

(1) (1915) 24 C. L. J. 60.
(2) (1914) 24 C. L. J. 62.
(3) (1908) 12 C. W. N. 528.
(4) (1909) 13 C. W. N. 407.
(5) (1915) 23 C. L. J. 151.
(6) (1898) I. L. R. 26 Calc. 194.
(7) (1880) 6 C. L. R. 539.
(8) (1907) 6 C. L. J. 472.

PRIVY COUNCIL.

PRESENT: *The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.*

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October, 30, 31. November, 23.

MAUNG SHWE GOH

v.

MAUNG INN AND OTHERS.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA].

Contract of sale of real property—English rule that purchaser is equitable owner not applicable to those parts of India where the Transfer of Property Act is in force—Date from which purchaser is entitled to rents and profits and vendor to interest on purchase money, how fixed—Transfer of Property Act (Act IV of 1882), S. 54.

The principle of English law, that a contract for sale of real property makes the purchaser the owner in equity of the estate, has no application to those parts of India where the Transfer of Property Act, section 54, is in force.

Quære. Whether the English rule based on such principle by which the purchaser, where the rights as to payment of interest on purchase-money are not regulated by the terms of the contract, is deemed to be entitled to the rents and profits and is liable for interest on unpaid purchase-money as from the time when he took, or could safely have taken, possession, is equally inapplicable?

Held, that, in the present case the contract itself provided the date on which the purchaser's ownership should begin, and also the date on which interest on purchase-money was to run, namely, the date on which the purchaser entered into possession.

Appeal from a decree of the Chief Court of Lower Burma, dated the 14th December, 1914, reversing an order of Ormond J., dated the 17th December, 1912.

One G. W. Davis mortgaged some land to Maung Shwe Goh, the present appellant, to secure the repayment of Rs. 50,000 and interest. Being unable to repay the amount due on the mortgage Davis wrote a letter in the following terms:—

"Rangoon 4th April, 1906.

My dear Maung Shwe Goh,

I write this to inform you that as I have not got the interest due on Rs. 50,000 ready now I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before the 6th July 1906, I agree the whole land being sold to you for Rupees one lakh (Rs. 100,000). After deducting out of this amount Rs. 50,600 already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally."

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Davis did not pay the interest due on the 6th July 1906; Maung Shwe Goh called upon him to carry out the promise to sell the land contained in the above letter. Davis repudiated the letter. On the 17th August 1906, Maung Shwe Goh instituted a suit for specific performance of the contract. Litigation between the parties went on until July 1911, when His Majesty's Order in Council on an appeal by Davis was passed. The proceedings are reported in *Davis* v. *Maung Shwe Goh* (1). Davis remained in possession of the property until the 24th March 1911, but paid no interest on the mortgage. In taking the account of what should be deducted out of the purchase-price of rupees one lakh the Deputy Registrar allowed Maung Shwe Goh the principal Rs. 50,000, and interest up to the 24th March, 1911. Principal and interest amounted to Rs. 85684-5-1. This calculation was confirmed by the original Court.

Two subsequent mortgagees of the land had at their own request been made parties to the execution proceedings. Of these one (the second respondent in this appeal) preferred an appeal to the appellate side of the Chief Court, contending that Maung Shwe Goh should be allowed interest on the mortgage only up to 6th July, 1906. This contention was upheld and the appeal allowed. Fox C. J. and Parlett J. holding that the maxim that equity regards as done what should have been done was applicable and that Maung Shwe Goh should be deemed the owner as from the 6th July, 1906. Maung Shwe Goh, thereupon appealed to His Majesty in Council.

Sir H. Erle Richards K. C., and *Coltman* for the Appellant: The question is whether "all interest due thereon" in Davis's letter means interest up to the date when appellant got the property or only interest up to the date when he became entitled to it.

I submit that this is really a question of contract, and that on the true construction of the document appellant is entitled to interest till he got possession: that the mortgage ran on and that the lands were to become appellant's unconditionally when the account was cleared. At the time of the contract he already had a mortgage with a covenant to pay interest.

[Lord Wrenbury: The phrase "all interest due thereon" occurs twice. Does it mean the same in both places?.]

The letter does not mean that the appellant is to give up the rights he already had, but that he only contracted to release the mortgage-debt on completion.

The doctrines of equity invoked by the Chief Court do not apply. The principle that the purchaser is in equity the owner

(1) (1911) L. R. 38 I. A. 155; I. L. R. 38 Calc. 805.

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does not apply to India, owing to section 54 of the Transfer of Property Act. The whole Act is not in force in Lower Burma, but this particular section is. Reference was made to Dart's Vendor and Purchasers, 7th edition, Vol. 1, pages 652, 653: Stokes' Introduction to the Anglo-Indian Codes. Vol. 1, page 730: and the notes to section 54 in Shephard and Brown's Commentaries on the Transfer of Property Act (7th edition, page 187).

The 6th July was not the date for completion, but only the date on which the contract was to become operative. The 1st respondent, who was the legal representative of Davis's estate, did not appear.

J. H. Cunliffe K. C., and *D. Cotes Preedy* for *Kenelm Preedy*, serving in H. M. forces, for the second and third respondents (subsequent mortgagees).

The Chief Court have correctly held that on the 6th July 1906 what was previously a mortgage became a contract of sale. There was never any question raised as to the vendor's title either before or after that date : the purchaser already had the title deeds.

[Lord Chancellor : Isn't the English doctrine based on this, that the purchaser is the owner and entitled to enter, and that the only thing which deters him is the uncertainty as to the title ? It seems that in India he has not the right to enter].

[Lord Wrenbury : If he has no interest in the *res*, he has no right to enter. His interest in *the res* only dates from the registration of the transfer.]

The time fixed for completion was the 6th July, 1906. It is admitted that completion was delayed by the wrongful conduct of the vendor : but the proper remedy is to make him responsible for the rents and profits, and give him interest on the unpaid purchase-money.

[*Lord Wrenbury* : But in India he can't get the rents and profits, as he had no interest in the *res* : so on what ground should he pay interest on the unpaid purchase money ? We cannot fine people : what you say may be very fair, but we have to give effect to rights.]

The interest on the unpaid purchase money should anyhow be set against the interest on the mortgage. The Board held in the former appeal that the vendor lost his right to redeem on 6th July, 1906. The whole object of the litigation was to save that right. Redemption is an essential part of mortgage : *Noakes* v. *Rice* (1).

When the right to redeem went, the mortgage ceased to exist, and the interest on it similarly ceases. It is in the power of the

(1) (1902) A. C. 24 (30).

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Court to prevent any injustice to the purchaser by giving him rents and profits.

Our argument does not rest merely on the doctrine that the purchaser is in equity the owner, but on the broader rule that equity looks upon that done which ought to be done.

The position of vendor and purchaser is distinctive of that of mortgagor and mortgagee.

The phrase in Davis's letter "interest due thereon" means interest up to 6th July 1906, at which date it was intended that account should be taken.

Sir Erle Richards, K. C., replied.

The judgment of their Lordships was delivered by

November, 23.

The Lord Chancellor :—This appeal is a step—and their Lordships hope the last step—in litigation, which was commenced on the 17th August, 1906, by the present appellant, who claimed against one George William Davis specific performance of a contract dated the 4th April, 1906, for the sale of some 19,318 acres of land situate in the Pegu district, Lower Burma. The question raised depends on the true construction of this contract, but in order to understand its meaning it is necessary to consider some antecedent facts.

On the 30th September, 1905, a formal mortgage of the property, which subsequently became the subject of the contract, was executed by the defendant Davis in favour of the appellant to secure the repayment of 50,000 rupees on the 30th December, 1905, together with interest at the rate of 8 annas per cent. per month, and also interest thereafter at the current bank rate of interest in Rangoon. It appears from the mortgage that it was really given as security for the payment of 50,000 rupees, the amount of 5 hundis which had been drawn by the mortgagor upon the mortgagee and negotiated by the mortgagor with the bank at Bengal. The mortgage contained a formal conveyance of real property and a covenant, the effect of which has already been mentioned. It also contained a further and independent covenant that if the sum of 50,000 rupees should not be paid when it was due, the mortgagor would pay interest thereon at 8 annas per cent. per month, and also interest on the 50,000 rupees at the current bank rate until the principal should be duly paid. The hundis were not met by the mortgagor at the due date, and were renewed until the 4th April, 1906, on which date the mortgagor, not being in a position to pay the money, wrote to the plaintiff a letter in the following terms :—

"My dear Maung Shwe Goh,

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"I write this to inform you that as I have not got the interest due on 50,000 rupees ready now I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before the 6th July, 1906, I agree the whole land being sold to you for 1 lakh rupees (100,000 rupees). After deducting out of this amount 50,000 rupees already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally."

The request was acceded to by the plaintiff, and the contract thus made is the contract in question.

The money was not paid by the date fixed, and on the 6th July, 1906, the mortgagee paid to the Bank of Bengal the 50,000 rupees due on the hundis, and thus became entitled to whatever rights were conferred upon him by the agreement. The mortgagor refused to execute a conveyance of the property to the plaintiff, indeed he denied the authenticity of his signature to the contract, and thus compelled the plaintiff to institute the proceedings out of which this appeal has arisen.

The learned Judge by whom the suit was heard dismissed it on the 18th February, 1908, but this judgment was reversed by the Chief Court of Lower Burma, and by their order of the 11th May, 1909, specific performance of the agreement contained in the letter of the 4th April, 1906, was ordered against the mortgagor, and this order was affirmed on appeal by this Board on the 5th July, 1911.

The defendant Davis died on the 14th August, 1911, and the first respondent to this appeal is his legal representative. The other respondents represent mortgagees from Davis under mortgages executed subsequently to that in favour of the plaintiff.

The appellant entered into possession of the property on the 24th March, 1911, but it does not appear that even up to the present time a proper conveyance of the equity of redemption has ever been executed in his favour, an order obtained from the Court on the 25th January, 1910, directing such conveyance to be executed on behalf of Davis by the Assistant Registrar, having been set aside upon the grounds that proper notice of the application had not been served upon Davis.

The present appeal arises out of an application which is in form for execution of the judgment for specific performance, and the question involved affects only the manner in which the purchase-money payable under the contract for sale ought to be calculated. On the part of the appellant, it is contended that interest continued to run upon his mortgage until the date when he entered

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into possession, that consequently the principal sum of 50,000 rupees, together with the agreed interest up to that date, ought to be deducted from the 100,000 rupees, which was the purchase price, and the balance only should be paid by him. This view was accepted by the Registrar and his decision was upheld by the Judges of the Chief Court, but was reversed by the appellate Court, who decided that the appellant was only entitled to bring into account the amount due for principal and interest up to the 6th July, 1906. The foundation of this judgment depends upon the application to the contract of the 4th April, 1906, of the well-known rule by which the rights of vendors and purchasers of real estate are regulated in this country. In the English Courts, a contract for sale of real property makes the purchaser the owner in equity of the estate, and from this principle it follows that, where the rights as to payment of interest on the purchase money are not regulated by the terms of the contract, the purchaser is deemed to be entitled to the rents and profits of the property, as from the time when he did take or could safely have taken, possession; and interest on the purchase-money runs in favour of the vendor from that time. It has been pointed out to their Lordships that the underlying principle, upon which this rule depends, has no application to the sale of real estate in Lower Burma, since by section 54 of the Transfer of Property Act, 1882 (a statute made applicable to Lower Burma), it is expressly provided that such a contract creates no interest in or charge upon the land. If, therefore, the contract was silent in dealing with the question of interest, their Lordships think that the appellant would have strong ground for contending that the reasoning in the Court of appeal could not be supported. It is an unfortunate fact that this argument never appears to have been raised at any earlier stage of these proceedings; and their Lordships have not, therefore, the advantage of the opinion of the learned Judges of the Appellate Division upon this point. But the matter need not be pursued because, in their Lordships' opinion, apart altogether from this consideration, upon the true construction of the contract the appellant must succeed. At the date when the contract was executed a valid legal mortgage was on foot, containing an express covenant for payment of the 50,000 rupees and interest until the debt was discharged. The money was due when the contract was made, and the contract opens with the request for three months' further time for payment of the "interest due thereon". In this connection, it is clear that the "interest due thereon" is the interest payable under the mortgage deed up to the

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time, whatever it may be, on or before the 6th July, 1906, when the 50,000 rupees might be paid. On failing to pay at the date, the agreement became operative for sale of the land, and the final words, in their Lordships' view, which provided for deduction from the purchase price of the 50,000 rupees "and all interest due thereon," means that this deduction should be made at the time when the balance is to be paid, and this would be the completion of the contract. The mere fact that the phrase "interest due thereon" occurs twice in the contract does not involve the conclusion that the date up to which interest is to be calculated is the same on both occasions, but when once it is accepted that the dates are different all difficulty disappears, since it then follows that interest is by agreement continuing to run on the principal money. This interest is that reserved under the mortgage-deed, and it must continue to run until the debt is discharged, which can only be when the balance is struck and paid. If, therefore, possession had not been taken by the purchaser, and no default could be attributed to him, the interest would have gone on until the transfer was executed, but it appears that he has been put into possession under the contract, and of course he could not both retain the rents and receive the interest. The order therefore of the Registrar was quite right in allowing interest up to, but not beyond, the date when he took possession.

Counsel for the respondents has urged that, by virtue of the contract, the mortgage was ended, since a mortgagee, who has contracted to buy the equity of redemption, stands in the position of a purchaser, which is inconsistent with that of a mortgagee. But, whatever might result from such argument, where the rights of the parties were entirely untouched by the terms of the contract, such consideration cannot apply where the contract has itself provided what the rights are to be. This, in their Lordships' opinion, is what the contract did, and they therefore think that the appeal succeeds.

The order appealed from must therefore be reversed with costs here and below, and the order of the Judge of first instance restored. The respondents will repay any costs paid to them by the appellant. Their Lordships will humbly advise His Majesty accordingly.

Arnould and Son :—Solicitors for the Appellant.

Stoneham and Sons :—Solicitors for the Second and Third Respondents.

J. M. P. *Appeal allowed.*

PRESENT: *Lord Shaw, Lord Sumner, Sir John Edge, and Mr. Ameer Ali.*

MAHARAJA RAM NARAYAN SINGH

v.

ADHINDRA NATH MUKHURJI AND OTHERS.*

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL).

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April, 7. May, 12.

Zarbharna (usufructuary mortgage)—Invalid mortgage—Charge—Effect of parties acting under it—provision for repayment in a particular manner—Relation of debtor and creditor, how far to be implied from the fact of mortgage—Transfer of Property Act (Act IV of 1882), Secs. 59, 67 (a) and 100.

The plaintiffs were put in possession of certain villages under the usufructuary mortgage deed which in this case provides for the repayment of Rs. 1,30,000 with interest. On the expiry of the term of the mortgage they gave up possession. Several years later they sued alleging that a large part of their debt was not satisfied, and claiming a mortgage decree for the balance, or alternatively a simple money decree; the mortgage deed not being duly attested as required by section 59 of the Transfer of Property Act, was not enforceable as a mortgage:

Held, that the parties had treated the said deed, though invalid, as a usufructuary mortgage and their respective rights must be determined by its terms; that it did not create a charge within section 100 of the Transfer of Property Act, nor could the mortgagees, by reason of section 67 (a) thereof institute a suit for sale based on it; that the clear intention of the parties, to be inferred from the deed, was that the mortgage money should be repayable from the usufruct and not from the person of the mortgagor; that it could not be inferred from the mere mention of the advance in the deed that it was the intention of the parties that the mortgagor should be personally liable to repay it, and that the suit must be dismissed.

Appeal by special leave from an order of the Calcutta High Court, setting aside a preliminary decree of the Subordinate Judge of Hazaribagh.

Maharaja Ram Narayan Singh, father of appellant, borrowed Rs. 1,30,000 from Rai Babu Jadu Nath Mukhurji, father of respondents and in consideration thereof gave him a (zarbharna) usufructuary mortgage deed providing for the repayment of the loan with interest out of the rents and cesses of certain villages. Possession was given to the mortgagee under the deed, which was however invalid as a mortgage deed owing to defective attestation. The material terms of the deed are set out in the judgment of their

* [The order in Council was subsequently set aside on review see *Maharaja Ram Narayan v. Adhindra* (1916) 25 C. L. J. 121—Ed.]

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Lordships of the Privy Council. On the expiry of the term limited in the deed, possession was restored to the mortgagor. Six years later respondents sued for a sum of Rs. 1,57,985 balance alleged by them to be due, and prayed (*a*) for a mortgage decree (*b*) alternatively for a simple money decree against appellant to be realised out of his deceased father's assets which had come to him.

Appellant denied liability and pleaded limitation, but the Subordinate Judge overruled his contention and gave plaintiffs a preliminary decree, referring to a Commissioner the task of deciding how much was due. On appeal by defendant the Calcutta High Court (Mookerjee and Carnduff JJ.) upheld the Subordinate Judge's decision on other points, but set aside his order delegating the rest of the case to a Commissioner, and remitted it to him for trial.

Defendant preferred the present further appeal to the Privy Council.

De Gruyther K. C., and *Dube* for Appellant.

Respondents did not appear.

De Gruyther, K. C. for appellant, after referring to the provisions of the deed, submitted that it provided for absolute redemption and discharge at the end of the period of 7 years. It is expressly provided that there shall be no personal claim against the mortgagor except in one special case. The relationship of debtor and creditor did not exist, as it would in the case of a simple loan. The case falls within the principle of *Kalka Singh* v. *Parasram* (1).

It is part of the contract that the debt should be discharged by the usfructuary mortgage, and it has been discharged.

If the acts of the mortgagor gave independent causes of action such causes of action arose not on the mortgage itself but at the dates of such acts, and suits on such causes of action are long since barred. The instances specified do not really come within the provisions of the deed or give any cause of action.

The judgment of their Lordships was delivered by

May, 12.

Sir John Edge.—This is an appeal from an order of the High Court at Calcutta, dated the 30th August, 1911, which set aside a preliminary decree of the Subordinate Judge of Hazaribagh, dated the 30th June, 1910, in a suit brought upon a mortgage, and remanded the case to the Court of the Subordinate Judge to be dealt with in accordance with the directions contained in the judgment

(1) (1894) L. R. 22 I. A. 68; I. L. R. 22 Calc. 434.

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of the High Court. The respondents, who are the plaintiffs, have not appeared.

The deed upon which the suit was brought was made on the 14th April, 1896, by Maharaja Nam Narayan Singh in favour of Rai Babu Jadu Nath Mukhurji, a Government pleader who had been employed as a pleader by the Maharaja. The consideration was Rs. 1,30,000 which were advanced by Jadu Nath Mukhurji to Maharaja Nam Narayan Singh. The principal moneys, together with interest, at the rate of 10 annas per centum per mensem were to be repaid as provided by the deed, by and out of the rents and cesses of certain mokurari villages of Maharaja Nam Narayan Singh, which were mortgaged with possession to Jadu Nath Mukhurji. A schedule to the deed shows how the repayment with interest was to be effected, and that on the determination, on the 14th January, 1903, of the period for which the mortgage was granted, it was contemplated that the debt with interest would be satisfied, and a balance of Rs. 230-11-3 would be payable to the Maharaja by Jadu Nath Mukhurji. The total period for which the mortgage was granted was from the Sambat year 1953 to the Sambat year 1959, that is, from A.D. 1896 to the 14th January, 1903, and the times when possession of the different mokurari villages was to be given to Jadu Nath Mukhurji were specified.

Having regard to the claim which has been made in this suit, the following extracts from the deed appear to their Lordships to be of importance:—

"It is desired that the said pleader zarbharnadar should realise in full his dues, principal with interest, by remaining in possession of each of the said properties during the said years and by collecting the rents with cesses thereof. The details of the time when and the manner in which the principal and interest will be realised by the said pleader zarbharnadar are given at the foot of this deed. The specifications of the villages with jummabandis, pergunnahs, stations, sub-registry, district registry, and zillahs wherein the said villages lie are given herein below. The said pleader zarbharnadar should realise year after year from the elakadars and tenants mentioned in this deed in accordance with the above specifications. If any elakadars or tenants mentioned in this deed put off paying the rents, &c., then it is and will be in the power of the said pleader zarbharnadar to realise the same with interest, damages, and costs by instituting suits in Court in his own name as zarbharnadar plaintiff, with prayer for ejectment or in any other proper way. In case of ejectment, the said pleader zarbharnadar will realise the zarbharna

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money from the kham tehsil or from thikadar of such village, and any amount of excess jumma resulting from the kham jumma or thikadari jumma in respect of the resumed villages over the jumma mentioned in the bond, whatever it may be, shall be paid on taking receipt by the said zarbharnadar or his heirs to me the executant, or my heirs, year after year. I, the executant, will give the thika pottah of the resumed villages. The zarbharnadar shall have no right to grant the thika pottah of such villages. If, for any reason, the jumma of any village as mentioned in the bond decreases, the said zarbharnadar shall be entitled to get from me, the executant, the amount of decrease with interest at the above-mentioned rate. After the expiry of the term of the zarbharna, I, the executant, shall have the right to take possession of the resumed villages as well as of the other villages mentioned in this bond on account of the expiry of the term and redemption of mortgage, and the said pleader zarbharnadar shall have no right whatever to the same.

"During the term of the zarbharna, I, the executant, or my heirs and representatives, shall on no account collect the rents with cesses of the zarbharna properties mentioned in this bond."

"If by mistake I, the executant, or my heirs make any collection, then I or my heirs shall be liable to pay the amount collected with interest at the above rate to the said pleader zarbharnadar. Except in such a case for no other reason and on no other account, the zarbharnadar has and shall have any claim whatever against me, the executant, or my heirs and representatives, on the ground of realisation and non-realisation. If a claim is made, it is and shall be totally null and void. The said pleader zarbharnadar shall not be in any way liable for the Government revenue, Road and Public Works cesses or any other public demand. These things shall concern me, the executant. The sum of Rs. 230-11-3, the excess amount payable by the zarbharnadar to me, the executant, in 1959, as stated in the account mentioned in this deed, shall be paid to me, the executant, on taking receipt by the said zarbharnadar in Pous of the said year. In case of default on the due date aforesaid, interest at the above rate up to the date of realisation shall be paid on the excess amount by the zarbharnadar."

The mortgage was in their Lordships' opinion an usufructuary mortgage within the meaning of section 67 *(a)* of the Transfer of Property Act, 1882, but as it was not attested by at least two witnesses, as required by section 59 of that Act, it was not enforceable as a mortgage. However, possession of the respective mokurari villages was at the time specified in the mortgage given to Jadu Nath

Mukhurji. Except in the events mentioned in the extracts which have been set out above, Maharaja Nam Narayan Singh did not bind himself personally to repay the mortgage money or any of it. The clear intention of the parties, to be inferred from the deed, was that the mortgage money should be repayable from the usufruct and not personally by the Maharaja. On the termination of the mortgage period possession of the mokurari villages which had been mortgaged was given to the Maharaja or his representatives. Jadu Nath Mukhurji died in 1902.

On the 13th January, 1909, this suit was instituted against Raja Ram Narayan Singh, son of Maharaja Nam Narayan Sing who had died. The plaintiffs, who claim to represent Jadu Nath Mukhurji, alleged in their plaint that Rs. 85,272-14-9 only had been realised under the deed, and prayed for the following reliefs :—

"*(a.)* That a decree be passed for Rs. 1,57,985-5-3, or a decree be passed ordering, according to Order XXXIV, Rule 4, of the Code of Civil Procedure (1908), that (1) an account be taken of what will be due to the plaintiffs for principal and interest on the bond (the mortgage deed) and for cost of the suit ; that (2) defendant do pay into Court the amount so due on a day within six months from the date of the decree ; that (3) in default of payment as aforesaid the charged properties, as per schedule B, or a sufficient part thereof be sold and the sale proceeds be applied in payment of what is declared due to the plaintiffs as aforesaid, together with subsequent interest and subsequent cost.

(b.) That if in the opinion of the Court the plaintiffs be not entitled to a decree under Order XXXIV, Rule 4, a simple money decree for the amount of Rs. 1,57,985-5-3, or whatever may be due with cost and subsequent interest be passed against the defendant, to be realised out of the properties which devolved on him after his father's death."

In order to understand the object and meaning of these alternative claims it must be mentioned that the plaintiffs' case was that the deed of the 14th April, 1896, was not a usufructuary mortgage, but that it had created a charge within the meaning of section 100 of the Transfer of Property Act, 1882, upon the mokurari villages. It had, however, been treated by Maharaja Nam Narayan Singh and Jadu Nath Mukhurji as a usufructury mortgage, and under it Jadu Nath Mukhurji obtained and held possession of the mokurari villages, and it contained the terms upon which the Rs. 1,30,000 were advanced, and the terms upon which that advance was to be repaid. That document certainly did not create a charge within the meaning

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of section 100 of the Transfer of Property Act, 1882; it was a usufructuary mortgage, which could not be enforced as a mortgage. Even if it could be regarded as an enforceable usufructuary mortgage the plaintiffs could not, by reason of section 67 *(a)*, institute a suit for sale based upon it.

Their Lordships are in this appeal placed in a disadvantageous position by reason of the respondents not having appeared, but it is necessary for them to consider whether the plaintiffs have in their plaint stated any cause of action which is shown by their plaint as maintainable and not barred by limitation, and for this purpose it is necessary to consider the causes of action which are alleged in the plaint and the agreement upon which the Rs. 1,30,000 were advanced, which is to be found in the document of the 14th April, 1896. The Subordinate Judge and the High Court have assumed from the mention in that document that the Rs. 1,30,000 had been advanced that it might be inferred that it was the intention of the parties that the Maharaja Nam Narayan Singh should be personally liable to repay the advance. Their Lordships do not draw that inference from that document. On the contrary, their Lordships draw the inference from that document that the Maharaja Nam Narayan Singh did not intend that he should be personally liable for the repayment of any portion of the money advanced, except to the extent and in one or other of the events mentioned in the extracts which have been already given, and that Jadu Nath Mukhurji was, in advancing the Rs. 1,30,000, content to rely upon the security of a usufructuary mortgage of the mokurari villages. Although the document of the 14th April, 1896, was by reason of its not having been attested as required by the Transfer of Property Act, 1882, not enforceable as a mortgage, Jadu Nath Mukhurji got possession under it of the mokurari villages, and held possession for the agreed period.

The case, which the plaintiffs attempted to make in the Courts below, was substantially based upon the existence of a personal liability in debt on the part of the mortgagor even after the determination of the period of the usufructuary mortgage and arising by implication from its terms. Since in their opinion this case fails, their Lordships think it unnecessary to discuss the other causes of action pleaded, which, though possibly capable of being sustained in other suits if brought within the periods of limitation, are not established in the present suit. It is enough to add that their Lordships are not satisfied that any of these alleged causes of action,

even if they were otherwise maintainable, were not barred by limitation when this suit was instituted.

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An examination of the schedule attached to the plaint shows that the amount claimed is to a considerable extent composed of charges in respect of collection expenses, of costs of suits, of interest upon such collection expenses and costs, and of compound interest.

Lokendra Nath Mukhurji, a son of Jadu Nath Mukhurji, in his evidence stated that when his father died in 1902 all his books were with him, and they were not found after his death, and admitted in cross-examination that in a previous suit he had deposed that the zarbharna (usufructuary mortgage) account was in a state of confusion, "and that was sometime in 1906." This may account for the vague nature of the allegations in the plaint, and for the delay in instituting the suit.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the order of the High Court and the preliminary decree of the Subordinate Judge should be set aside, and that the suit should be dismissed with costs throughout.

The respondents must pay the costs of the appeal.

Barrow, Rogers and Nevill :—Solicitors for the Appellant.

The Respondents did not appear.

J. M. P. *Appeal allowed.*

PRESENT: *Lord Parker of Waddington, Lord Sumner and Sir Lawrence Jenkins.*

MAHARAJA RAM NARAYAN SINGH

v.

ADHINDRA NATH MUKHURJI AND OTHERS.

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL).

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1916.
July, 28, October, 26, 27, November, 16.

Mortgage—Usufructuary mortgage deed—Construction—Personal liability of mortgagor—Loan—Wrongful acts of the mortgagor—Transfer of Property Act (Act IV of 1882) Sec. 68—Privy Council practice—Order in Council after an ex parte *hearing of appeal—Application to set aside the order—Fraud of a party's agent.*

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In considering the question whether a usufructuary mortgagor is personally liable for payment of that portion of the loan and interest which remained unsatisfied out of the usufruct of the mortgaged property, it must be borne in mind (1) that a loan *prima facie* involves such a personal liability (2) that such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest: but (3) that the nature and terms of such security may negative any personal liability on the part of the borrower: and (4) that even if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (b) or (c) of the Transfer of Property Act.

The plaintiffs were put in possession of certain villages under a usufructuary mortgage deed providing for the repayment of a loan with interest. On the expiry of the term of the mortgage they gave up possession. Thereafter they sued alleging *inter alia* that owing to wrongful acts of the mortgagor they had failed to realize a large part of their debt, and claiming a mortgage decree for the balance or alternatively a simple money decree.

Held, that the nature and the terms of the deed were such as to show that it was not originally intended that the mortgagor should be personally liable, but that such liability might have arisen subsequently under section 68 of the Transfer of Property Act. The case was remitted for further trial to allow the respondents an opportunity of proving their allegations as to wrongful acts of the mortgagor, and of establishing that such acts rendered him personally liable.

The appeal was originally heard *ex parte* and allowed. An Order in Council was accordingly drawn up. The respondents subsequently petitioned for setting aside the order in Council and reinstatement of the appeal on the ground that they had been debarred from appearing by the fraud of their agent, who had misappropriated the moneys entrusted to him to enter an appearance with. The order in Council was set aside and the appeal ordered to be reheard on the condition that the respondents paid the costs of the petition in any event and the costs of the hearing thrown away.

Appeal from a decree of the Calcutta High Court, setting aside a preliminary decree of the Subordinate Judge of Hazaribagh.

Maharaja Ram Narayan Singh, father of the appellants, borrowed Rs. 1,30,000 from Rai Babu Jadu Nath Mukerji, father of respondents, and in consideration thereof gave him a (*sarbharna*) usufructuary mortgage deed providing for the repayment of the loan with interest out of the rents of certain villages. The deed was not attested as required by section 59 of the Transfer of Property Act. Possession of the villages was given to the mortgagee in terms of the deed, and, on the expiry of the period limited therein, was restored to the mortgagor. Within six years from the expiry of the term the respondents sued the appellants for a sum of Rs. 1,57,985 balance alleged by them to be due. They admitted that the deed effected no mortgage, but claimed that it created a charge within the meaning of section 100 of the Transfer of Property Act. They alleged in paras. 6 and 7 of the plaint that by

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certain wrongful acts of the mortgagor they had been prevented from collecting rents and otherwise realising their security, and prayed (*a*) for a mortgage decree and (*b*) alternatively for a simple money-decree against the appellant to be realised out of his deceased father's assets which had come to his hands.

Appellant denied liability and pleaded limitation. The Subordinate Judge held that the deed created no charge as contended by plaintiffs; but that the mortgagor was personally liable and that the respondents could claim on the basis of a breach of contract. The principal contest before him was whether such personal liability was barred by limitation; he held that it was not, and gave plaintiffs a preliminary decree, referring to a Commissioner to decide how much was due. On appeal by defendant the High Court (Mookerjee J., and Carnduff J.) upheld this judgment on other points, but remitted the rest of the case to the Subordinate Judge himself. On the question of the mortgagor's personal liability, which was one of the grounds of appeal, they observed that the unqualified admission of indebtedness contained in the deed was equivalent to an express covenant and created a personal obligation, and that though a mode of payment was prescribed in the deed, the creditor was not limited to that mode alone. Defendant then appealed to His Majesty in Council.

The appeal was originally heard *ex parte* (Lord Shaw, Lord Summer, Sir John Edge, and Mr. Ameer Ali) and allowed and the suit dismissed on the ground that no personal liability of the mortgagor was established. The proceedings are reported [*Maharaja Ram Narayan Singh* v. *Adhindranath* (1)] at where the material parts of the deed are set out. An order in Council giving effect to the judgment was drawn up.

Thereafter respondents petitioned to set aside the order in Council and for rehearing of the appeal, alleging that they had been prevented from appearing by the fraud of one W. to whom they had paid moneys at Calcutta on his false allegations that he represented a well-known firm of English Solicitors in London, and would take necessary steps in England, but that the said W. had disappeared with the money. The petition was heard by the Lord Chancellor (Lord Buckmaster), Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor.

July, 23.

Sir Robert Finlay K. C., and *J. M. Parikh* appearing for the Petitioner and *De Gruyther K. C.*, and *Dube* for the Appellants. The facts were not disputed. The Board ordered that the Order

(1) (1916) 25 C. L. J. 115.

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in Council be set aside and all proceedings thereunder stayed, and that the appeal be restored, subject to the respondents paying the costs of the hearing thrown away, and the costs of the petition.

At the second hearing *De Gruyther K. C.*, and *Dube*, for the Appellant, submitted that the personal liability of the mortgagor was sought to be established in a mortgage suit based on the bond, but that the bond did not create any such liability : it provided a mode of repayment by collecting rents, and threw upon the mortgagee risks of the collections proving insufficient.

[Lord Parker : The mortgagee has no remedy unless he is paid in a certain way].

It cannot be contended that because the deed is invalid as a mortgage, the personal liability is not excluded by it. Both parties have acted on the deed, and as between them its provisions are binding in equity. *Mahomed Musa* v. *Aghore Kumar Ganguli* (1). The personal liability of the mortgagor under the bond, even if it exists, is barred after 6 years : Art. 116, Schedule 1 of the Limitation Act.

The true cause of action is not on the bond, but on the alleged wrongful acts of the mortgagor subsequent thereto. Any suit based on such wrongful acts is long since barred.

Even if plaintiffs have a cause of action they cannot succeed in this suit ; the action is bad as framed.

Sir Robert Finlay, K. C., and *J. M. Parikh*, for Respondents : No cause has been shown to disturb the order appealed against. The wrongful acts alleged in the plaint bring section 68 of the Transfer of Property Act into operation ; they make the mortgagor personally liable even if he were not so liable before.

The mortgagor acknowledged in writing his liability on the 28th December, 1903 ; this saved limitation by virtue of section 19 of the Limitation Act., 1908. Reference was made to *Narayana Ayyar* v. *Venkataramana Ayyar* (2) ; and *Ittapan Kuthiravattat Nayer* v. *Nanu Sastri* (3).

[Sir Lawrence Jenkins (referred to section 20].

Limitation may also be saved by that section, as rents have been collected right down to 1908.

De Gruyther, K. C., in reply : The admission of debt contained in the acknowledgment relied upon referred only to the obligation under the bond, and did not create any obligation to pay in other than the stipulated manner. *Kalka Singh* v. *Parasram* (4).

(1) (1914) L. R. 42 I. A. 1; I. L. R. 42 Calc. 801 ; 21 C. L. J. 231.
(2) (1902) I. L. R. 25 Mad. 220. (3) (1902) I. L. R. 26 Mad. 34 (37).
(4) (1894) L. R. 28 I. A. 63 (75).

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November, 16.

Their Lordships' judgment was delivered by

Lord Parker of Waddington.—This is the rehearing of an appeal from the High Court at Calcutta, dated the 30th August, 1911, which set aside a preliminary decree of the Subordinate Jodge and remitted the case to the Court of the Subordinate Judge to be dealt with in accordance with certain directions contained in the judgment of the High Court. At the original hearing the present respondents did not appear and the appellant obtained an order setting aside the decree of the High Court at Calcutta and dismissing the action in which the appeal arose. Subsequently the respondents obtained an order of His Majesty discharging the order thus made, on the ground that it was by the fraud of his agent that he was not represented by counsel at the hearing, and directing the appeal to be reheard, the costs thrown away to be dealt with upon such rehearing. The appeal has accordingly been reheard before their Lordships, who have had the advantage of hearing counsel on both sides.

The facts out of which this action arose may be stated as follows: In the year 1895, Maharajah Sri Sri Ram Narayan Singh Bahadur (whom their Lordships will hereafter refer to as the mortgagor) executed in favour of Rai Jadu Nath Mukerji Bahadur (whom their Lordships will hereafter refer to as the mortgagee) a deed dated the 14th April in that year. This deed recites that the mortgagor had borrowed from the mortgagee a sum of 1,30,000 rupees, and for the repayment of the loan with interest, as therein mentioned, had given in zarbharna the rents and cesses of the mokurari villages therein described. The villages are divided into groups, the distinguishing mark of each group being the date at which the mortgagee is to take possession. The possession of all the villages is to be redelivered to the mortgagor on the 14th January, 1903, it being calculated that by that date the amount due to the mortgageee for principal and interest will have been satisfied out of the rents of the several villages. The deed contains an elaborate schedule showing the details of this calculation. It also expressly precludes the mortgagor collecting any of the rents during the term of the zarbharna. It also contains the following clause:—

"If by mistake I" (the mortgagor) "or my heirs make any collection, then I or my heirs shall be liable to pay the amount collected with interest at the above rate...Except in such a case, for no other reason and on no other account, the zarbharnadar has and shall have any claim whatever against me or my heirs and representatives on the ground of realisation and non-realisation. If a claim is made, it is and shall be totally null and void."

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It is common ground that the mortgagee obtained possession of the several groups of villages at the respective dates in that behalf specified in the deed, and retained possession thereof for the term of the zarbharna, and at the expiration of such term redelivered the villages to the mortgagor. The mortgagee, however, did not in fact receive by the collection of the rents sufficient to discharge the principal of the loan with interest as mentioned in the deed.

On the 13th January, 1909, within 6 years from the expiration of the term of the zarbharna, the respondents, who represent the mortgagee, instituted the present action. By their plaint they asked relief either (1) in accordance with Order XXXIV, Rule 4, of the Civil Procedure Code, on the footing of an existing mortgage of the villages described in the deed; or (2) on the footing of a personal liability on the part of the mortgagor. They claimed to realise what was due to them: in the first alternative, out of the mortgaged villages; and, in the second, out of the estate of the mortgagor, who was then dead.

In the course of the action it appeared that the deed of the 14th April, 1896, was unattested, and it was accordingly held by the Subordinate Judge that it could not, having regard to "The Transfer of Property Act, 1882," section 59, be enforced as a mortgage. The respondents did not appeal from and are bound by this decision. The sole question which remained therefore was whether there was any personal liability on the part of the mortgagor for payment of that portion of the loan and interest which remained unsatisfied out of the rents of the villages. In considering this question it must be borne in mind (1) that a loan *prima facie* involves such a personal liability; (2) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but (3) that the nature and terms of such security may negative any personal liability on the part of the borrower. It must also be borne in mind that even if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (*b*) or (*c*) of "The Transfer of Property Act." From the argument advanced by the respondents it now appears that paragraphs 6 and 7 of the plaint were intended to show that the object of the allegations made therein was to raise a case under this section. The truth of these allegations was not investigated at the trial, so that the Subordinate Judge could not have relied on them. He held that although the document of the 14th April, 1896, was, according to its true construction, merely a usufructuary mortgage non-enforceable for want of attestation, the

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mortgagor came under personal liability for payment and that this liability was not statute-barred; and by preliminary decree he referred it to a Commissioner to take an account of what had been received by the mortgagee under such mortgage. His reasons for holding that there was such personal liability are somewhat obscure.

Against this decision the present appellant appealed to the High Court, and on the hearing of the appeal the High Court upheld the decision of the Subordinate Judge so far as it determined the existence on the part of the mortgagor of a personal liability not barred by statute, but discharged the reference to a Commissioner on the ground that such a reference would involve the trial of the issues raised in paragraphs 6 and 7 of the plaint, which issues could not be properly referred to a Commissioner, but ought to be determined by the Subordinate Judge himself. The action was, therefore, remitted to the Subordinate Judge to be disposed of in accordance with this decision. The High Court held that the deed of the 14th April, 1896, according to its true construction, imposed on the mortgagor a personal liability, or at any rate did not negative the personal liability incident to a transaction of loan.

The appellant further appealed to His Majesty in Council, and as before mentioned the case came before the Board in the absence of the respondents. The Board were of opinion that having regard to the nature of the deed of the 14th April, 1896, which was a usufructuary mortgage only, and to its terms, any personal liability on the part of the mortgagor was excluded; and that though the allegations of paragraphs 6 and 7 of the plaint might, if established, give rise to other rights of action, such rights could not be enforced in an action based substantially on a personal liability arising by implication from the terms of the deed itself. In the absence of the respondents the attention of the Board does not seem to have been directed to section 68 of "The Transfer of Property Act, 1882", or to the effect of that section if the allegations of paragraphs 6 and 7 of the plaint were established.

Their Lordships, after hearing the respondents, see no reason to differ from the conclusion arrived at upon the first hearing of this appeal, to the effect that the nature and terms of the deed of the 14th April, 1896, are such as to show that it was not originally intended that the mortgagor should be personally liable. They think, however, that the respondents ought to be given an opportunity of proving the allegations of paragraphs 6 and 7 of their plaint, and of establishing that those facts are sufficient to bring the 68th section of "The Transfer of Property Act" into operation.

P. C.

1916.

Ram Narayan v. Adhindra Nath.

Lord Parker of Waddington.

It is to be observed that the position of the mortgagor under this section cannot, by reason of the non-attestation of the deed, be better than it would have been if the mortgage had been duly attested. Their Lordships express no opinion with regard to the question of limitation. This must largely depend upon facts, which have not as yet been investigated. For example, the plaint contains a statement of account which contains items of rents collected up to 1908, and the circumstances under which these rents were received may be material in considering whether the mortgagee's right, if any, is statute-barred. In their Lordships' opinion, the proper course is to discharge the orders made by the Subordinate Judge and the High Court respectively, and to remit the action to the Subordinate Judge for further trial. The appeal having succeeded in part only, there will be no costs of this hearing, but the respondents ought to pay the costs of the previous hearing, which have been thrown away. Their Lordships think the costs incurred before the High Court and the Subordinate Judge should abide the result of the further hearing. Their Lordships will humbly advise His Majesty accordingly.

Barrow, Rogers and Nevill :—Solicitors for the Appellant.

E. Dalgado :—Solicitor for the Respondents.

J. M P. *Appeal allowed in part.*

APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Doss.

CIVIL.

1910.

February, 22, 23. March, 8.

MAKBUL ALI AND OTHERS

v.

JOGESH CHANDRA RAY*

AND

JOGESH CHANDRA RAY

v.

MAKBUL ALI AND OTHERS.*

Holding, partly cultivated and partly waste—Stipulation to assess rent on the cultivated area—Rental fixed by Settlement Officer for the holding—Rental,

* Appeals from Orders Nos. 537, 557 and 558 of 1907, against the orders of remand passed by B K. Mullick, Esq., District Judge of Chittagong, dated the 9th September, 1907, reversing the decision of Babu Aswini Kumar Das Gupta, Munsiff, 2nd Court at Satkania, dated the 22nd December, 1906, and Appeal from Appellate Decree No. 2024 of 1907, against the decree of Babu Hem Chandra Mukherjee, Subordinate Judge, 2nd Court, at Chittagong, dated the 17th July, 1907, and Appeal from Appellate Decree No. 1431 of 1908, against the decree of B. K. Mullick, Esq., District Judge of Chittagong, dated the 28th March, 1908, affirming the decree of Babu Aswini Kumar Das Gupta, Munsiff, 2nd Court, at Satkania, dated the 31st January, 1907, and the 22nd December, 1906, respectively.

increment of, for the area cultivated—Bengal Tenancy Act (VIII of 1885), Secs. 107, 113, if operate as a bar—Realisation of rent at the admitted rate—Additional rent for the same period for the increase of the cultivated area, recovery of—Estoppel.

CIVIL. 1910. Makbul Ali v. Jogesh.

Where a holding consisted partly of *khila* (waste) lands and partly of *hasila* (cultivated) lands, and there was a stipulation that on the *khila* lands becoming *hasila* they would be assessed at the settlement rate of rent :

Held, that the increase in the rental would accrue automatically on any portion of the waste becoming cultivated, although the settlement officer fixed a consolidated rental on the holding ; and neither section 113 nor any other section of the Bengal Tenancy Act could operate as a legal bar to the assessment of an additional rent on the portion of the *khila* area actually cultivated, at the original fair rental rate accepted by the settlement officer.

Ram Chunder Chuckrabutty v. *Giridhar Dutt and others* (1) referred to.

Held further, the mere fact that the landlord realised from the tenant the admitted rent for the years in suit would not estop him from recovering additional rent for the same period on account of the increase of the cultivated area, in the absence of a finding that the tenant paid him on the understanding that no further demand would be made.

Suits instituted by the Noabad Talukdar to recover arrears of rent in respect of the *khila* lands which became *hasila* during the years in suit. It appears there was a stipulation with the tenants that on the waste lands becoming cultivated, they would be assessed at the settlement rate of rent. It further appears that a consolidated rental was fixed by the Settlement officer on each of the holdings, and the talukdar realised from the tenants the admitted rents for the years in suit. Plaintiff now brought suits for recovery of additional rents for the same period on account of the increase in the *hasila* area.

The Court of first instance dismissed the suits. On appeal the appellate Court remanded three of the cases to the Court of first instance, and dismissed the other two. The tenants defendants then preferred three appeals to the High Court against the orders of remand passed by the lower appellate Court, and the landlord also preferred two appeals to the High Court against the decrees of the lower appellate Court.

In M. A. Nos. 537, 557, and 558 of 1907.

Mr. Casperss, Moulvi Syed Shamsul Huda and *Babu Girija Prasanna Roy Chaudhury* for the Appellants.

Dr. Rash Behary Ghosh and *Babus Tara Kishore Chaudhury* and *D. L. Khastgir* for the Respondents.

(1) (1891) I. L. R. 19 Calc. 755 (758).

CIVIL.
1910.
Makbul Ali
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In S. A. 2024 of 1907.

Babus Tara Kishore Chaudhuri and *D. L. Khastgir* for the Appellant.

Moulvi Syed Shamsul Huda for the Respondents.

In S. A. 1431 of 1908.

Babus Tara Kishore Chaudhuri and *D. L. Khastgir* for the Appellant.

Moulvi Serajul Islam and *Babu Jyotish Chandra Sarkar* for the Respondents.

C. A. V.

The judgment of the Court was as follows:

M. A. Nos. 537, 557 and 558-07.

March, 8.

These are appeals by the tenants in suits instituted by the Noabad Talukdar to recover arrears of rent in respect of the *Khila* lands which became *hasila* during the years 1264 to 1267 of the Maghi era which is prevalent in the district of Chittagong where the lands are situated. The word *Khila* signifies 'waste'; *hasila* on the other hand means 'cultivated'. It is admitted that the talukdar has realised his rent dues for the years in suit, in accordance with the rentals fixed as fair by the Settlement Officer. The question for determination is whether the fair rate of rent is to be applied to the *Khila* lands as soon as they became *Hasila* (as contended for by the talukdar) or whether the assessment should be made after fifteen years (the period mentioned in the written statements of the tenants).

The first Court dismissed the suits. On appeal, the District Judge of Chittagong has remanded the cases under section 562 of the Old Code of Civil Procedure, for a finding upon the point whether the lands were brought under cultivation before the year 1267 M. E. The District Judge has found that the talukdar is entitled to receive additional rent on the *Khila* areas in the respective suits for the years 1264—1267 M. E. "if they are fit for cultivation."

It is urged for the tenants (defendants appellants) that the Settlement Officer, in the year 1892 fixed a consolidated rental on each of the holdings, his decision having the force of a decree in virtue of section 107 of the Bengal Tenancy Act as it stood in the year 1892 before the amending Act III (B. C.) of 1898 remodelled Chapter X of the Rent Law. It has, also, been argued, though not very strenuously, that the plaintiff, talukdar, having realised the

CIVIL. 1920. Makbul Ali v. Jogesh.

admitted rents for the years in suit cannot now recover additional rent for the same period.

The second contention must fail because there is no finding, nor do the rent receipts show, that the talukdar received his dues from the tenants, and that the latter paid him on the understanding that no further demands would be made. The principle of estoppel clearly does not apply to the facts of these cases and we do not find that the talukdar made any admissions on the subject of the *Khila* areas being left unassessed.

The first contention, also, cannot succeed in the circumstances of this litigation. One of the peculiarities of the Chittagong Land Revenue System is that tenants have *Khila* lands included in their holdings for the purpose of reclamation though rent is assessed on the actual *hasila* area only. Hence the stipulation "*Khila hasila* haila bondobastimate nirrekh", that is, on the waste lands becoming cultivated, they will be assessed at the settlement rate of rent. The khatian (of the year 1895) contains the entry to the effect already mentioned, namely, that *Khila* was to be assessed with rent on becoming *hasila*. This latter entry, or stipulation, is based on the admission recorded in the fair rent proceedings of the year 1892, that the tenants were "liable to pay at the rate of 8 annas a kani on the *hasila* area." In our opinion the increase in the rental would accrue automatically on any portion of the waste becoming cultivated. To such a process neither section 113, nor any other section of the Bengal Tenancy Act, can opertate as a legal bar. Whatever degree of finality may attach to the decision of the Settlement Officer, it is not a question, here, of *res judicata*, but of construction. The decision proceeds on the basis of the admitted and settled incident of the tenancy, and additional rent is imposed on account of the increase in the *hasila* area. The *taluki rubokari* drawn up two years after the fixation of fair rents on the tenants, is not relevant for the present purpose. It only shows that the *khila* lands left in possession of the talukdar were dealt with on a different system, the terms imposed on the talukdar being peculiar to him.

We are fortified in our conclusions by the observations of Pigot and Banerji JJ. in *Ram Chunder Chuckrabutty* v. *Giridhur Dutt* (1), where the facts were similar to those of the present cases.

There is, however, a verbal inaccuracy in the judgment of the District Judge. The *khila* portions of the tenants' holdings cannot be assessed with additional rent merely "if they are fit for cultiva-

(1) (1891) I. L. R. 19 Calc. 755 (758).

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tion." The proper direction, and we now make it, is that any portions of the *Khila* areas *actually-cultivated* during the years in suit, or any shorter period within that limit, shall be assessed with additional rent at the original fair rent rates accepted by the Settlement Officer. With this variation these appeals are dismissed with costs.

Appeal No. 2024.

We accept the entry in the plaintiff's khatian as correct inasmuch as it accords with the decision of the Settlement Officer which proceeds on the basis of the incident subsequently recorded in such entry. For reasons similar in all respects to those given in our judgment just delivered in the connected appeals Nos. 537, 557, 558 of 1907, we set aside the decision of the Subordinate Judge confirming the dismissal of the plaintiff talukdar's suit, and we direct that the case be remanded to the Court of first instance to be dealt with in accordance with the observations we have made in regard to those appeals.

The appeal is allowed with costs.

Appeal No. 1431.

In this case the amount of rent Rs 49 was assessed on a holding which consisted entirely of *khila* lands. The plaintiff's khatian contains an entry purporting to be an admission by the raiyat in occupation of the land at the time of the settlement that "when the lands of the holdings (which were then Nalbat) are fully cultivated, there will be remission of rent for four years, after which the rent will be at the rate of Rs. 22 per drone". The plaintiff has purchased the rights of this raiyat in the holding and has brought the present suit for rent against the under-raiyat. The latter cannot be placed in a more favourable position than their lessor, and, if the lands have been fully cultivated for more than four years, the higher rate of Rs. 22 per drone must be applied.

This appeal also is allowed with costs. The case is remanded to the Court of first instance to be dealt with agreeably to the direction we have given.

Orders modified.

A. N. R. C. *Appeals allowed : Cases remanded.*

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

PROMOTHA NATH ROY AND OTHERS

v.

KISHORE LAL SAHA AND OTHERS.*

CIVIL.

1916.

May, 23.

Limitation—Adverse possession—Termination of possession in fact—Absence of possession—Actual possession—Limitation Act (IX of 1908), Sec. 16—'Proceeding'—Suit to set aside sale.

Per Curiam: The word 'proceeding' in section 16 of the Limitation Act is comprehensive enough to include a suit as well as an application. The exclusion of the period is allowed during which the validity of the sale is in controversy, whether the sale is impeached by suit or by application.

Per Mookerjee, J.: In order to bring a case within the statute of limitation, there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected.

Agency Co. v. Short (1) referred to.

Immediately after an execution sale, the defendants took proceedings to set it aside, but were unsuccessful. They then instituted a suit in 1895 to set aside the decree on the ground of fraud and to have the sale cancelled as held pursuant to a fraudulent decree. The proceedings in that suit terminated on the 27th June, 1905, when it was dismissed:

Held, that in the eye of the law, the possession vested in the plaintiffs, the rightful owners, as soon as the occupation of the defendants terminated in fact: *Secretary of State v. Krishnamoni* (2). Consequently, the plaintiffs' cause of action arose in 1905, when the defendants took possession.

Appeal by the Defendants.

Suit to recover possession.

The plaintiffs based their title to purchase at a sale in execution of a decree in 1893. The defence in substance was that the defendants had a two-fold interest in the land, namely, an interest as tenure-holders, and an interest as occupancy raiyats: that what the plaintiffs purchased in 1893 constituted their interest as tenure-holders; and, that, accordingly they were entitled to remain in possession by virtue

* Letters Patent Appeal No. 26 of 1915, against the decision of Mr. Justice Mullick, dated the 1st February, 1915, in Appeal from Appellate Decree No. 1817 of 1911, against the decree of Babu Sarat Kishore Bose, Officiating Subordinate Judge, 2nd Court of Pabna, dated the 8th April, 1911, reversing the decree of Babu Durga Kanta Roy, Munsiff, 2nd Court, of Pabna, dated the 6th July, 1910.

(1) (1888) L. R. 13 App. Cas. 793 (799).
(2) (1902) I. L. R. 29 Calc. 518; L. R. 29 I. A. 104.

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of their occupancy right. The defendants further pleaded that the suit was barred by limitation under article 138 of the schedule to the Limitation Act, inasmuch as the suit had not been instituted within 12 years from the date when the sale became absolute. The Subordinate Judge over-ruled these objections and made a decree in favour of the plaintiffs. The appeal of the defendants to the High Court was dismissed by the following judgment of Mr. Justice Mullick.

1915. *February, 1.*

Mullick, J.—This is a suit for 3½ bighas of land situated in Mouza Dogachi. It is admitted that defendants Nos. 3—6 otherwise described in these proceedings as the malik defendants had a patni taluki interest in two-thirds of the village and a kayemi jote interest in the remaining one-third. The plaintiffs bought both interests at an auction sale in 1893. There was litigation between the plaintiffs and the malik defendants till the Privy Council finally upheld the sale in 1905. The plaintiffs allege that in 1907 defendants Nos. 1 and 2 having obtained a settlement from the malik defendants dispossessed the plaintiffs. In 1909 the present suit was brought for a declaration of title and possession. Defendants Nos. 1 and 3—6 contest the suit. Their defence is that the malik defendants had in addition to the patni and kayemi jote rights an ordinary jote right in the lands in suit; that this right was an ancient right and was never merged when the defendants acquired the patni and the kayemi rights in mouza Dogachi; that it is still alive and that the plaintiff is therefore not entitled to succeed in ejectment. The learned Munsiff found that the suit was barred by 12 years limitation and that the malik defendants had the jote right alleged. He accordingly dismissed the suit. In appeal the learned Subordinate Judge has reversed that decree and hence the defendants appeal.

The learned Subordinate Judge in the first part of his judgment states that it is probable that the ordinary jote right set up by the malik defendants was allowed by their predecessors to merge in the patni and kayemi-jote rights. In my opinion this is a finding of fact although not expressed in very definite terms. Then the learned Subordinate Judge goes on to say that apart from the question of merger the defendants have not been able to prove that the lands in suit fall within the alleged jote. This finding would conclude the case but the appellants attack it on the ground that it is vitiated by an error in placing the onus of proof. Now it is true that in a suit for ejectment the onus is on the plaintiff to prove his title. But here the plaintiffs having given evidence that they are the immediate proprietors of the village it is for the defendants to prove their

tenancy. The class of cases on which the appellants rely refers to disputes regarding a parcel of land contiguous to an admitted jote and has no application to the facts before us. In this view of the case the appeal is concluded by a finding of fact and must fail. The question of merger has been argued at some length, and the weight of authority seems to be in favour of the view that the English law of merger does not apply to the mufassil. But it is not necessary for me to discuss this question in the present case as the appellants are met with the difficulty that the learned Court of appeal below from a consideration of the evidence and the conduct of the parties finds as a fact that the jote right was allowed to merge in the superior rights.

Finally there remains the question of limitation. The learned Munsiff finds that the plaintiffs never obtained possession after their auction purchase of 1893 and that the defendants were in adverse possession from that date. The learned Subordinate Judge on the other hand finds that the plaintiff did obtain possession within one year of 1893 and that although after this while litigation was going on they allowed the land to remain waste till 1905, they were in constructive possession during the whole of that period. This is a finding of fact which concludes this case so far as limitation is concerned. The learned Subordinate Judge, however, goes on to consider a further aspect of the case. He applies section 16 of the Limitation Act and finds that the plaintiff is entitled to exclude from the period of limitation the years during which litigation in regard to the sale went on in India and in England between the parties. On the other hand the defendants urge that the case is one under article 138 of the Limitation Act and that the limitation of 12 years will run from the date of the confirmation of sale, about the exact date of which, it is to be noted there is no evidence. With regard to section 16 the defendants urge that the plaintiff is entitled to count only the period which was occupied in proceedings to set aside the sale, *i. e.*, proceedings under sections 244 and 311 of the Civil Procedure Code of 1882, and that section 16 does not cover suits for setting aside sales. In my opinion the word 'proceedings' covers suits and ought not to be restricted in the manner which the defendants desire. The learned Judge below having found that the auction purchaser was put in possession article 138 is not applicable to the suit and I agree with the plaintiffs that the proper article to apply is Art. 144. The plaint contains a sufficient statement of the facts to entitle the plaintiffs under order 7, rule 6 of the Civil

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Procedure Code of 1908 to claim the benefit of section 16 of the Limitation Act, *Raghu Nath* v. *Samad Shah* (1), so that if the plaintiff is entitled to the period during which litigation was carried on for the purpose of setting aside the sale he is well within time even if adverse possession runs against him from 1893. Therefore all the contentions raised before me in regard to limitation fail. The result is that the appeal is dismissed with costs.

Against this judgment, the defendants preferred an appeal under section 15 of the Letters Patent.

Babus Dwarka Nath Chuckerbutty, Hira Lal Chuckerbutty and Jitendra Nath Mookerjee for the Appellants.

Sir S. P. Sinha (Advocate-General), Dr. Dwarka Nath Mitter and Babu Baikuntha Nath Mitter for the Respondents.

The judgments of the Court were as follows :

May, 23.

Sanderson, C. J.—In my judgment this appeal should be dismissed.

I intend to say very little about the facts of the case, because they are dealt with fully by the learned Subordinate Judge. It seems to me that the learned Subordinate Judge has found two facts, either of which is sufficient to defeat the appellants' case : He has found that "the *Jote* right existed prior to the acquisition of the *putni* and *Kaemi* Jote, but within about the last quarter of a century the *malik* defendants ignored such right and exercised only their more important tenure right....... On consideration of the above facts it seems to be probable that the *malik* defendants' predecessor allowed the minor *Jote* right to merge in the larger right and therefore everything passed to the plaintiffs". When one comes to consider that the *putni* right was acquired at least some fifty years before the institution of the suit, I cannot help thinking that the learned Subordinate Judge was right in coming to the conclusion that the minor right had been allowed to merge in the larger one. Then in order to make the matter quite certain, the learned Judge goes on to say that even supposing that the minor right did not merge in the larger one, the plaintiffs would be entitled to succeed unless the defendant could show that the lands in suit were comprised in his *Jote* upon which he relies and he finds as a fact that the defendant has not discharged that *onus* of proof that the lands in suit were comprised in his *Jote*, that in itself is sufficient to defeat the defendant's case. For these reasons I think

(1) (1908) 7 C. L. J. 560 ; 12 C. W. N. 617

the learned Judge was right in coming to the conclusion at which he arrived.

Then arises the other question upon the statute of limitation. It appears that the sale took place in 1893, and this suit was not brought until 1909. The sale was an auction sale under certain decree. In 1895 a suit was instituted for the purpose of setting aside that decree and also the sale which was completed under it, and the suit was taken from one Court to another and finally to the Privy Council, where decision was given in the year 1905, by which the plaintiffs were declared to be entitled to the land which they had bought in the year 1893. In my judgment, it is quite sufficient to say that section 16 of the Limitation Act applies to this case, and if it does apply, all the time during which the proceeding to set aside the sale has been prosecuted should be excluded. It is obvious that the first part of this section applies to the suit in question, because this was a suit by a purchaser at a sale in execution of a decree for possession of the land. The only point which is taken by the learned vakil is that the suit which was instituted for the purpose of setting aside the sale was not a *proceeding* within the meaning of section 16. I see no reason for limiting the word 'proceeding' which is a word of general meaning to something which is not a *suit*. In my opinion it includes a *suit*. It would be a most unreasonable interpretation to put upon the word to say that if a proceeding to set aside a sale is instituted by a petition then the time which is occupied by that proceeding should be excluded, whereas if a proceeding to set aside a sale be instituted, in the form of a suit the time occupied by such a proceeding should not be excluded. I think this would lead to an unreasonable and unjust result: therefore, in my opinion the time which was occupied in the prosecution of the suit to set aside the sale, namely from 1895 to 1905, ought to be excluded, in the computation of the time under article 138. Therefore, the suit was brought within time.

For these reasons I think that the appeal should be dismissed with costs.

Mookerjee, J.—I agree that the decree which was made in favour of the plaintiffs by the Subordinate Judge and has been affirmed by Mr. Justice Mullick cannot be successfully assailed.

The plaintiffs seek to recover possession of the land in dispute on the basis of title acquired by purchase at a sale in execution of a decree in 1893. Their case was that, notwithstanding the sale,

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the defendants, who are the representatives of their judgment-debtor, have remained in occupation without right or title. The defence in substance was that the defendants had a two-fold interest in the land, namely, an interest as tenure-holders, and, an interest as occupancy raiyats;—that what the plaintiffs purchased in 1893 constituted their interest as tenure-holders; and that, accordingly, they were entitled to remain in possession by virtue of their occupancy right. The defendants further pleaded that the suit was barred by limitation under article 138 of the schedule to the Indian Limitation Act; inasmuch as the suit had not been instituted within 12 years from the date when the sale became absolute. The Subordinate Judge has over-ruled these objections and has made a decree in favour of the plaintiffs.

As regards the first point, the Subordinate Judge has found that the defendants did not keep alive their original occupancy right, distinct and separate from their right as tenure-holders, and that consequently they were not entitled to fall back upon their occupancy right on the allegation that the plaintiffs had purchased nothing beyond their right as tenure-holders. This view is obviously sound. No question of merger by operation of law arises here, and we are not called upon to discuss whether, against the will of the defendants the subordinate had merged in the superior interest. The question really is, what has been the conduct of the defendants; have they kept alive and distinct the two interests which they possessed. From the circumstances set out in the judgment of the Subordinate Judge there can be no room for doubt as to the correctness of his conclusion that the defendants had not kept distinct the occupancy right from their right as tenure-holders. The defendants created an under-tenure on the property; if their occupancy right had been kept alive, they would have become tenants under the under-tenure-holder and would have been under an obligation to pay him rent; this they admittedly never did; their conduct is consistent only with the hypothesis that they treated the occupancy right as no longer existent. They cannot now turn round and set up the occupancy right to the detriment of the execution purchaser.

As regards the second point, the Subordinate Judge has assigned two reasons in support of his view that the suit is not barred by limitation, namely, *first*, that as the land remained actually vacant for ten years from 1895 to 1905, during pendency of litigation by the judgment-debtors to set aside the sale, time runs from 1905; and *secondly* that, in any view, the plaintiffs are entitled under

section 16 of the Limitation Act, to a deduction of the time during which the legality of the sale was under investigation in Court. In my opinion, each of these reasons is well-founded on principle. It transpires that immediately after the execution sale, the defendants took proceedings to set it aside under section 311 of the Civil Procedure Code, but were unsuccessful. They then instituted a suit in 1895 to set aside the decree on the ground of fraud and to have the sale cancelled as held pursuant to a fraudulent decree. The proceedings in that suit which are reported in *Pran Nath* v. *Mohesh* (1); *Radha Raman* v. *Pran Nath* (2); *Khagendra* v. *Pran Nath* (3) and terminated on the 27th June, 1905, when it was dismissed by the judicial Committee. During these ten years, from 1895 to 1905, the land was unoccupied, and, the plaintiffs could not have brought a suit for ejectment against the defendants; in the eye of the law, the possession vested in the plaintiffs, the rightful owners, as soon as the occupation of the defendants terminated in fact: *Secretary of State* v. *Krishnamoni* (4). Consequently, the dispossession, which affords the plaintiffs cause of action for this suit, dates back only to 1905, when the defendants took possession. This view is supported by high authority. Lord Macnaghten in the case of *Agency Company* v. *Short* (5) quoted with approval the statement of Baron Parke in *Smith* v. *Lloyd* (6); and Blackburne, C. J. in *McDonnell* v. *McKinty* (7), "that in order to bring a case within the statute of limitation, there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected to bring the case within the statute." The first reason assigned by the Subordinate Judge is consequently well-founded. The second ground is equally unassailable.

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Section 16 provides that "In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded." We have been invited by the appellants to put a narrow construction upon the term "proceeding" and to limit it to an application to set aside the sale; but there is no good reason why the term "proceeding" should be so restricted. The term "application" occurs in other parts of the Limitation Act; if the legislature had

(1) (1897) I. L. R. 24 Calc. 546. (2) (1901) I. L. R. 28 Calc. 475 P. C.
(3) (1902) I. L. R. 29 Calc. 395 P. C.
(4) (1902) I. L. R. 29 Calc. 518; L. R. 29 I. A. 104.
(5) (1888) L. R. 13 App. Cas. 793 (799).
(6) (1854) 9 Exch. 562. (7) (1847) 10 Irish. L. R. 514.

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intended that section 16 should be restricted to cases where an application had been made to set aside a sale, the word "application" might have been used instead of the term "proceeding." In my opinion, the word "proceeding" is comprehensive enough to include a suit as well as an application, and the obvious intention of the legislature was to allow an exclusion of the period during which the validity of the sale is in controversy, whether the sale is impeached by a suit or by an application. The plea of limitation thus fails.

A. T. M. *Appeal dismissed.*

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

CIVIL. 1916. *June, 9.*

KALI CHARAN SINHA

v.

ASHUTOSH SINHA AND ON HIS DEATH HIS LEGAL REPRESENTATIVE SUSHILABALA DEBI AND OTHERS.*

Mesne profits—Will alleged to be made by trespasser—Executor of a forged will in possession—Probate revoked—Trespasser's legal representative, if liable.

In an action for mesne profits when the ground of the action is the bare fact of possession, damages can only be recovered for the time possession was actually retained.

B propounded a will alleged to have been executed by A, a trespasser; he obtained probate and took possession of the estates left by A. The genuineness of this will was called in question by the widow of A and her application for revocation of the probate was ultimately granted on the 29th September, 1909. But during the period which intervened between the grant and the revocation of the probate and for a short time afterwards, that is, from the 2nd April, 1906 to the 17th October, 1909, B was in possession of the estates of A and appropriated the profits thereof. To a claim for mesne profits by the decree-holder in a suit for possession:

Held, that the widow could not be made liable for the profits realised by B.

Appeal by the Plaintiff.

Claim for mesne profits.

The material facts and arguments appear from the judgment.

* Appeal from Original Decree No. 584 of 1914, against the decree of Babu Chandra Bhusan Banerjee, Subordinate Judge of Murshidabad, dated the 29th August, 1914.

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Babus Dwarka Nath Chuckerbutty, Sarat Kumar Mookerjee and Kalikinkar Chuckerbutty for the Appellant.

Babus Mahendra Nath Ray, Biraj Mohan Mojumdar, Upendra Nath Bagchi, Nagendra Nath Sen and *Jatindra Nath Bagchi* for the Respondents.

The judgments of the Court were as follows:

June, 9.

Sanderson, C. J.—This is an appeal from the judgment of the Subordinate Judge of Berhampore, arising out of a reference with regard to mesne profits.

The facts may be shortly stated as follows: The plaintiff claimed a third share of an estate which was left by a man called Ram Lal Singha, and he brought a suit against a relation who was called Shyama Charan Singha to have it declared that after the death of a female relation called Bhagabati Barmani he would be entitled to a third share. It appears that Shyama Charan Singha had gone into possession of the whole of the estate about the year 1901. The plaintiff in that suit got a decree in the Court of first instance. There was an appeal to the High Court, and the decree in favour of the plaintiff was upheld by the High Court in June 1905. Then there was an appeal by Shyama Charan to the Judicial Committee of the Privy Council and that appeal was not heard and decided until the year 1911 when the Judicial Committee of the Privy Council affirmed the decision of this Court, thereby declaring, as I have already said, that the plaintiff would be entitled to a third share of the estate after the death of Bhagabati Barmani. Before the decision of the Judicial Committee was given Bhagabati Barmani had in fact died, but the declaration was made in accordance with the prayer in the suit. Bhagabati died on the 3rd of December 1905. Shyama Charan died on the 1st of April 1906 and he was supposed to have left a will, and under that will two men called Ashu and Surendra were appointed executors; and in June 1916, they obtained probate of the will, and remained in possession of the property from that time until September or October of 1909, when the defendant in this case Kiranbala the widow of Shyama Charan applied to the Court and obtained revocation of probate. It was declared by the learned Subordinate Judge in this case that Kiranbala was executrix. It was stated during the course of the argument that that was a mistake, and that she never was executrix. It was then stated that she was administratrix. It then turned out that she never applied for letters of administration and she was never appointed administratrix. She was the *heir*, and

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after probate of the alleged will was revoked she went into possession of the estate, and was sued in this suit as representing the estate. I ought to have mentioned that the revocation of probate was obtained on the ground that the will was a forgery.

This suit was commenced on the 29th of July, 1907. It was brought against the executors of the alleged will, Ashu, Surendra and Satish, and it was also brought against the defendant Kiranbala and two other ladies. The decree in the case was passed on the 27th of April, 1911, after the decision of the Judicial Committee, which as I have already mentioned, was given on the 14th of February, 1911. After that decree there was no defence to this suit for possession brought by the plaintiff, and therefore a decree for possession was passed in favour of the plaintiff. Now no question arises with reference to the decree for possession. But in addition to the claim for possession, the plaintiff naturally made a claim for mesne profits in respect of the third share, from which he had been ousted from the date of the death of Bhagabati Barmani : and, the decree was framed in this way : after decreeing possession of the property in favour of the plaintiff it went on as follows, "It is further ordered that the mesne profits of the immovable properties mentioned in schedule (ka) of the plaint from the date of death of Bhagabati Barmanya till the date of institution of this suit as well as the mesne-profits from the date of institution of this suit till the date of recovery of possession of this property be enquired into and determined subsequently." Now, the point arises in this way : Shyama Charan was in possession of this property from 1901. The date from which mesne-profits are claimed is from 1905 when Bhagabati died. From that time until April, 1906, Shyama Charan was in possession. From April, 1906 to October, 1909, the executors under the forged will of Shyama Charan were in possession. From October, 1909 to April, 1911, the date of the decree Kiranbala herself was in possession : and, Kiranbala does not dispute her liability for mesne-profits in respect of the first period from December, 1905 to April, 1906, or in respect of the last period from October, 1909 to April, 1911. But she disputes her liability for mesne-profits in respect of the second period, namely from the 1st of April, 1906 to the 17th of October, 1909. The learned Judge referred the question to the Commissioner to ascertain what were the mesne-profits in respect of each one of those three periods, and after the Commissioner had made his report the learned Judge proceeded to discuss the question as to whether Kiranbala was liable for mesne-profits in respect of the second period. Now, it has been

argued by Mr. Chuckerbutty on behalf of the appellant, first of all, that that point was really not open to the defendant Kiranbala, because, he said, the decree which was passed in April, 1911, was to the effect that the plaintiff was not only to have possession, but the decree was a decree for mesne-profits for the whole of the period from 1905 down to 1911, not only against the defendants Nos. 2 to 4 but also against Kiranbala who never appealed, and the only question left open to be decided was the amount of these mesne-profits.

In my judgment I do not think that that is a right interpretation to put upon the decree. I think the words of the decree are pretty plain. I have read them once, and I will just refer to them quite shortly again: They are "that the mesne-profits of the immovable properties * * * * be enquired into and determined subsequently." I do not think that means that the learned Judge decided the liability of the defendants, but that he intended to leave the whole question open not only as regards the amount of mesne-profits but also as regards the liability of the respective defendants: and, that conclusion, to my mind, is corroborated in a very material respect by the course of the proceedings. This point which has now been urged by the learned vakil as far as I can make out, was not taken before the learned Judge before the commission was issued or after the return of the Commissioner's report; and if we refer to the judgment at page 143, it is clear that it could not have been taken, because there it is stated that the learned vakil for the plaintiff argued that Kiranbala as the widow and sole heiress of Shyama Charan Singh was liable for mesne-profits for the whole period from April, 1906 to October 1909, which was the period during which the so-called executors by virtue of the forged will were in possession, because Shyama Charan Singh at first kept the plaintiff out of possession and the tortuous act begun by him was continued after his death by his executors and heir; and hence as there was one cause of action and not successive causes of action the estate of the decased Shyama Charan Singh was liable for the mesne-profits, although the decree did not show that the estate of Shyama Charan Singh would be liable for wasilat. It seems to me that the whole of that argument would have been entirely unnecessary if the plaintiff's vakil had then been relying upon the point that the plaintiff had already got a judgment aginst these defendants for mesne-profits for the whole period and the only question was the assessment of those mesne-profits. Therefore, I think that the first point which the learned vakil has urged before us fails.

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Then comes the second point. That point is this, that inasmuch as this defendant Kiranbala is now in possession of the estate, and represents the estate of Shyama Charan Singh, and inasmuch as Shyama Charan was the person who first ousted the plaintiff from his lawful rights she must be liable for mesne-profits during this particular period.

It is only necessarry in my opinion to recapitulate the facts with reference to that period to show that that contention cannot succeed. During that period the people who were in possession were people who turned out to be wrong-doers,—people who had no right to be in possession of that share :—they were supposed to be executors under the forged will : and, even if this defendant Kiranbala, is sued as representing the estate, I do not see how she can be made liable for mesne-profits, during a time when she was not in possession, and during a time when wrong-doers were in possession. The definition of "mesne-profits," given in the Civil Procedure Code is in these words : "*mesne-profits*' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom." How can it be said that Kiranbala was the person in wrongful possession of the property during the period in question ? She herself certainly was not in possession. How can it be said that she was representing the estate and in such capacity was in wrongful possession during that period ? There was no continuity between her and the executors of the forged will, and there was no connection between herself and them, except the fact that she was a relation of theirs. I am at a loss to understand how it can be said that because the executors who were wrongfully in possession and who had in reality nothing whatever to do with the estate, were in possession at that time, she can be held liable for mesne-profits even though she does now represent the estate. For these reasons I think the learned Subordinate Judge was right when he disallowed the plaintiff's claim for mesne-profits in respect of this period against the defendant Kiranbala. Now, it may be said that the plaintiff has suffered hardship, as he has been kept out of this property for all this time, and he is not now going to recover any mesne-profits in respect of this particular period. But it seems to me that that is his own fault : He had included the executors who were actually in possession during this period as defendants in this action ; he got a decree against them for possession, and it was in the course of the proceedings with reference to mesne-profits that the plaintiff himself, according to the Subordinate Judge, who said that he did not wish

to proceed against those defendants in respect of mesne-profits. Therefore, if he is deprived of the mesne-profits for that period, in my judgment, the plaintiff himself is responsible for the loss he has sustained.

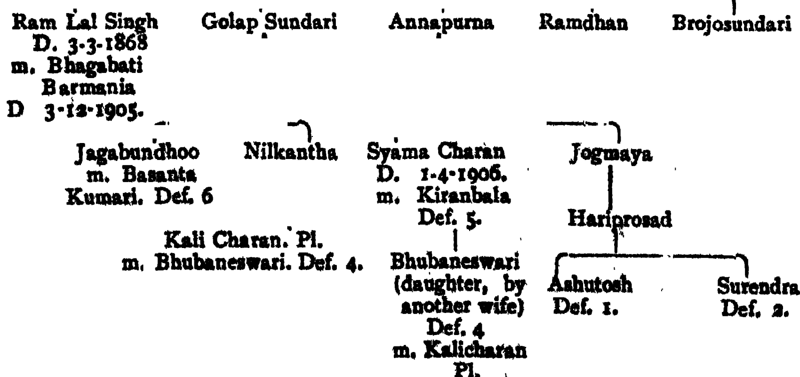
For these reasons I think that this appeal should be dismissed with costs.

Mookerjee, J.—I agree that the decree for mesne-profits made by the Subordinate Judge is clearly correct and must be affirmed.

The decree-holder appellant claims mesne-profits in respect of an one-third share of an estate originally owned by one Ram Lal Singha, who died on the 3rd March 1868. The period covered by the claim extends from the 3rd December 1905, to the 13th April 1911, and was sub-divided in the Court below as follows: first, from the 3rd December 1905, to the 1st April 1906; secondly, from the 2nd April 1906 to the 17th October 1909; and thirdly from the 18th October 1909, to the 13th April, 1911. The reason for this sub-division will be apparent from a brief recital of the history of the litigation which has resulted in these proceedings.

Ram Lal Singha had made a testamentary disposition of his properties, and, on his death was succeeded by his widow Bhagabati Burmanya. The widow executed a deed in favour of Shyama Charan Singha, a son of one of the sisters of her husband. A question thereupon arose as to the authority of the lady to deal in this manner with the estate left by her husband; and the result was the institution of a suit by the present appellant (who is a son of another sister of Ram Lal Singha) for construction of his will, and for incidental reliefs. The relationship between the parties is made clear by the following genealogical table. This was framed as a suit

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for a declaratory decree, as it was instituted during the life-time of the widow of Ram Lal Singha. The plaintiff was successful in the Court of first instance, and obtained a decree on the 24th April, 1903. That decree was confirmed by this Court on the 1st June, 1905; and the view adopted here was ultimately approved by the Judicial Committee on the 14th February, 1911. Meanwhile, Bhagabati Barmanya died on the 3rd December, 1905. Consequently, on the 29th July, 1907, the plaintiff instituted the present suit for recovery of possession and mesne-profits of an one-third share of the estate left by Ram Lal Singha. The claim for possession was decreed, practically without contest, as the title of the plaintiff had been already declared by this Court in the previous suit. The only question substantially in controversy between the parties was the liability for mesne-profits. The judgment and decree of the Subordinate Judge, dated the 27th April, 1911, plainly show that, at that stage, the determination of the question of mesne-profits was postponed. This, in my opinion, included the question, not merely of the amount of the mesne-profits, but also of the respective liability of the several defendants. The decree-holder applied for assessment of the mesne-profits on the 3rd December 1912, and the present appeal is directed against the final order of the 29th August 1914, made in the proceedings thus initiated. It appears from the order of the Subordinate Judge that, before him, the claim for mesne-profits was abandoned, except against one person, namely Kiran Bala Debi, the widow of Shyama Charan Singha. In this Court, it has been suggested that the Subordinate Judge misapprehended the situation and that the plaintiff decree-holder did not really intend to abandon his claim for mesne-profits, against the other defendants. There is no force in this contention. If there was a misapprehension on the part of the Subordinate Judge, the obvious course to adopt was to apply to him for a review, for he had a personal knowledge of what had happened in his Court. It is further significant that the position now assumed was not taken up at any stage of the proceedings in the Court below; indeed, the point does not appear to have been even mentioned before the Subordinate Judge, either before the matter was sent to the Commissioner for investigation or after the receipt of his report. Upon a plain reading of the first judgment of the Subordinate Judge, I must hold that the entire question of mesne-profits was left open, and that he was competent to consider, as he has considered, the question of the liability of the several parties.

It transpiers that on the death of Bhagabati Barmanya on the

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3rd December 1905, Shyama Charan Singha continued in occupation of the estate of Ram Lal Singha, till his death which took place on the 1st April 1906. It is clear that in respect of the mesne-profits for this period, the defendant Kiranbala Dabee, as representative in interest of her husband, is liable to the extent of the assets received by her for the estate of Shyama Charan Singh was enriched by the profits which he had derived by his unlawful possession of the estate of his maternal uncle Ram Lal Singha after the death of his maternal aunt Bhagabati Barmanya. There is, in reality, no controversy as to her liability for the mesne-profits of this the first period. As regards the mesne-profits for the third period, that is, from the 18th October 1909 to the 13th April 1911, there is equally no dispute, because it is conceded that during this period Kiranbala Dabee herself was in possession and is consequently bound to account for the profits received by her. The controversy centres round the second period, from the 2nd April 1906 to the 17th October 1909, and the facts material for the determination of the liability during this period may be concisely stated.

On the death of Shyama Charan Singh, three persons, who were joined by the plaintiff as the first three defendants in this litigation, propounded a will alleged to have been executed by him, obtained probate thereof and took possession of the estates left by Shyama Charan Singh and Ram Lal Singh. The genuineness of this will was called in question by Kiranbala Debi, and her application for revocation of the probate was ultimately granted on the 29th September, 1909. But during the period which intervened between the grant and the revocation of the probate, and for a short time afterwards, that is, from the 2nd April 1906, to the 17th October 1909, these three persons were in possession of the estates of Shyama Charan Singh and Ram Lal Singh, and appropriated the profits thereof. The plaintiff decree-holder now contends that he is entitled to recover from Kiranbala Debi as the present holder of the estate of her husband, the mesne-profits of this period. She repudiates the liability on the ground that during this period she was not in possession of the estate of Ram Lal Singha and cannot be justly called upon to account for profits not intercepted by her. The Subordinate Judge has accepted this contention, and in my opinion, his view cannot possibly be assailed.

It is an elementary rule that in an action for mesne-profits when the ground of the action is the bare fact of possession, damages can only be recovered for the time possession was actually retained. As the Court of Common Pleas ruled in *Stanynought* v.

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Cosins (1), "damages ought to be given for no longer time than defendant is proved to be in actual possession." The law on the subject is accurately summarised by Sedgwick in his work on Damages, 1912, Vol. III., section 911: "as to the period for which the defendant is liable, each occupant is answerable for the time he has been in possession: *Holcomb* v. *Rawlyns* (2), and a defendant cannot be charged in damages for a period when he was not in possession, in fact or in judgment of law, either personally or by agent or tenant: *Doe* v. *Harlow* (3); *Hunter* v. *Britts* (4); *Burne* v. *Richardson* (5); *Girdlestone* v. *Porter* (6)." This principle has been followed by this Court in a long line of cases: *Haradhun Dutt* v. *Joy Kisto Banerjee* (7); *Indurjeet Singh* v. *Baboo Radhey Singh* (8); *Abbas* v. *Fassih-ud-din* (9); *Ishan* v. *Ainuddin* (10). In the first of these cases, Jackson J. stated that it would be impossible to hold the defendant liable for profits which he had not received and never could have received. In the second case, Phear, J. observed as follows: "Generally from the nature of the claim to mesne-profits, mesne-profits ought not to be estimated for any period during which the defendant, who is to be made responsible for them was not active in keeping the plaintiff out of possession." In the third case, Trevelyan, J. held that even a wrong-doer is not responsible for the acts of another wrong-doer who is independent of him. In the fourth case, Hill, J. held that damages are claimable only for the period of the defendants' wrongful possession, actual or constructive. Substantially to the same effect are the decisions in *Churn Singh* v *Rungoo Singh* (11), and *Kishnanand* v. *Partab Narain* (12). Indeed, the very definition of the term "mesne-profits" given in section 2 (12) of the Civil Procedure Code shows that wrongful possession by the defendant is the foundation of his liability. It is clear that, in this case before us, Kiranbala Debi cannot be made liable for the profits of the second period, as she not only did not receive, but even with the utmost diligence could not have received the profits, which were realised by the first three defendants and could have been realised by them alone, so long as they retained their character as

(1) (1746) 2 Barnes 367.
(2) (1596) Cro. Eliz. 540.
(3) (1838) 12 A. & E. 40 (42).
(4) (1813) 3 Camp. 455; 14 R. R. 807.
(5) (1813) 4 Taunt. 720; 14 R. R. 647.
(6) (1799) Woodfall L. & T. 653 (7th Ed).
(7) (1869) 11 W. R. 444.
(8) (1874) 21 W. R. 269.
(9) (1897) I. L. R. 24 Calc. 413.
(10) (1901) 5 C. W. N. 720.
(11) (1871) 15 W. R. 221.
(12) (1884) L. R. 11 I. A. 88; I. L. R. 10 Calc. 785.

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executors under the probate of the forged will. In this view, it is needless to consider whether the grant in favour of the three executors was only voidable or was void *ab initio* : *Pundit Prayrag* v. *Goukaran* (1); *Sailaja Prosad* v. *Jadu Nath* (2). Whether they were or were not entitled to represent the estate of Shyama Charan Singh and to impose a burden thereupon, during the subsistence of the probate, it is manifest that their possession of the estate of Ram Lal Singha was entirely wrongful; and, I cannot appreciate on what conceivable principle of justice, equity and good conscience, Kiranbala Dabee can be called upon to restore to the plaintiff decree-holder the profits which she admittedly never received and which actually passed into the hands of the three persons who, on the pretence that they were executors to the estate of her husband, took wrongful possession of the estate of the maternal uncle of her husband.

On these grounds I hold that the order made by the Subordinate Judge is correct, and that this appeal must be dismissed with costs.

A. T. M. *Appeal dismissed.*

(1) (1902) 6 C. W. N. 787. (2) (1914) 21 C. L. J. 88; 19 C. W. N. 240.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

JAGANNATH PANJA

v.

MAHESH CHANDRA PAL.*

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Guardian—Appointment—Removal—Notice—Guardians and Wards Act (VIII of 1890), Secs. 34 (c), (d), 45 Sub-sec. (1) cl. (b).

No person should be appointed guardian of the person or property of an infant, without some enquiry about his fitness for the office.

No order for removal of a guardian of a minor should be made till he has been apprised of the charges brought against him and has been allowed reasonable opportunity to explain and if possible, to defend his conduct.

* Appeal from order No. 385 of 1914, against the orders of H. Walmsley, Esq., District Judge of 24-Pergunahs, dated the 23rd April, 7th May and 6th June, 1914.

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Section 45 sub-section (1) clause (b) of the Guardians and Wards Act, authorises the Court to impose a fine on the guardian, if the guardian fails to pay into Court the balance due from him on the accounts exhibited by him in compliance with a requisition under section 34 (c). The payment contemplated, has to be made in compliance with a requisition under section 34 (d). If the requisition be not in conformity with section 34 (d), no fine can validly be imposed on the guardians for failure to comply therewith.

Appeal by the Guardian.

The material facts and arguments appear from the judgment.

Babu Anilendra Nath Ray Chowdhry for the Appellant.

Babus Brojo Lal Chuckerbutty and *Gurudas Sinha* for the Respondent.

The judgment of the Court was delivered by

July, 10.

Mookerjee, J.—This appeal is directed against three orders made under the Guardians and Wards Act, 1890. The appellant Jagannath Panja, along with another person, Sasi Bhusan Kandar, was on the 25th April, 1911, appointed guardian of the property of an infant named Manmatha Nath Panja. On the 31st July, 1913, the respondent, Mahesh Chandra Pal, who alleges that he is a brother of the step-mother of the infant, made an application to the District Judge and prayed that the guardians might be called upon to file and to explain the accounts. Notices were thereupon served on the guardians to appear and explain why they had not filed the accounts. Some accounts which were then filed on behalf of the guardians, were examined by the translator; his report disclosed that the original account books and vouchers were requisite for the proper scrutiny of the accounts. Abstract of accounts and vouchers were subsequently filed by the guardians, and supplemental accounts also were brought into Court, which the translator was directed to examine. On the 3rd December, 1913, Mahesh Chandra Pal was granted permission to inspect the accounts and the translator was directed to note the objections. The translator submitted his report on or about the 19th February, 1914, and on that date the 26th February was fixed for the guardian to appear "so that an attempt might be made to secure some more satisfactory arrangement." This evidently had reference to the report of the translator which showed that, if his view was correct, the management of the estate of the infant had been far from satisfactory. This was followed by subsequent orders, in which the question was considered whether a fresh guardian of property might not, with advantage to the infant, be appointed, and on the 23rd April, 1914, the appellant

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as also his colleague were removed from the office of guardians of the estate of the minor on the ground that they were not trustworthy. They were, however, not discharged, and were called upon to bring into Court Rs. 300 which was stated by them to have been in their hands on the 16th April, 1914. They were also directed to produce a sum of Rs. 500 or 600, alleged to have been realised by them by the sale of paddy. Up to this stage, no notice had been served upon the guardians of any application to remove them from the guardianship of the infant; nor had they been called upon to show cause why they should not be so removed. On the 23rd April, 1914, the appellant, prayed that an enquiry might be made as to the truth of the charges brought against him by his colleague who upon his own motion had been discharged from guardianship on that date. On the 7th May, 1914, the Court recorded an order that neither of the two guardians of the property had produced Rs. 300, and that, contrary to the statements said to have been made before the Court on a previous occasion, each now alleged that the other held the money realised by sale of the paddy. The Court thereupon proceeded to impose a fine of Rs. 50 each on the appellant and the other guardian under section 45(*b*) of the Guardians and Wards Act. The order further directed that if the previous directions of the Court were not carried out in the course of five days, a daily fine of Rs. 10 would be imposed on each guardian from the following day. On that date, the respondent Mahesh Chandra Pal, who had moved the Court, and initiated these proceedings was appointed temporary guardian, both of the person and property of the infant. On the 6th June, 1914, there is an order recorded in the order-sheet that the fine imposed upon the appellant must be realised and that he must bring into Court Rs. 150 as the value of paddy in his hands. It may be mentioned here that a sum of Rs. 150 had already been brought into Court by the other guardian who was discharged at his own instance. This appeal is directed against the order of the 23rd April whereby the appellant was removed from the guardianship, as also the orders of the 7th May and 6th June, 1914, whereby fines were imposed upon him and he was directed to bring into Court the value of the paddy alleged to have been sold by him.

As regards the order for removal, it has been urged that the guardian should not have been removed till notice had been served upon him and he had been allowed reasonable opportunity to defend himself against the charges of mismanagement. The Guardians and Wards Act does not prescribe the procedure to be followed when the Court finds it necessary, either of its own motion

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or at the instance of a party interested in the welfare of the infant, to take steps for the removal of a guardian appointed by itself. But it is perfectly plain that no order for removal should be made till the guardian has been apprised of the charges brought against him and has been allowed reasonable opportunity to explain and if possible to defend his conduct. The procedure adopted in England for the removal of a guardian will be found described in the standard work on Chancery Practice by Daniell (Vol. I. page 982). It is there pointed out that an application to remove the guardian of the person or the estate of an infant must be made to the Court and be supported by evidence as well of the facts which render the application necessary as of the fitness of the proposed guardian and his consent to act. In the companion volume on Chancery Forms by Daniell, there are two forms [1398 and 1401] which set out the terms of the application and the contents of the affidavit whereby the application must be supported. It is clear from the form of the affidavit that special grounds for the application must be made out. Substantially, the same procedure is followed in the Courts of the United States. This procedure should, in our opinion, be followed in our Courts; based as it is upon the elementary rule that no order adverse to a party litigant should be made by a Court of justice till he has been apprised of the charges brought against him and has been allowed reasonable opportunity to show cause. As was observed by this Court in the case of *Tekait Ajant Singh* v. *H. T. Christien* (1), it is a rule of universal application, based on the plainest grounds of justice, equity and good conscience, that a judicial order, which may possibly affect or prejudice any party, should not be finally made, unless he has been afforded an opportunity to be heard. Consequently, the order for removal of the appellant from the office of guardian cannot be supported. The charges brought against him were of a grave character; if the view taken by the translator, on an examination of the accounts, is well-founded, there is good reason to apprehend that there has been serious mismanagement of the estate of the infant by the guardians, and their conduct may possibly amount to a criminal offence. It is obviously just that in a case of this character, opportunity should be given to the appellant to explain the accounts filed by him and to justify his conduct.

As regards the orders under section 45 (1) (*b*) whereby fines have been imposed upon the appellant and he has been called upon

(1) (1912) 17 C. W. N. 862.

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to bring into Court the sum of Rs. 150 as the value of paddy sold, we are of opinion that they have not been passed in conformity with the provisions of the Guardians and Wards Act and cannot consequently be supported. Section 45, sub-section (1), clause (*b*) authorises the Court to impose a fine on a guardian, if the guardian fails to pay into Court the balance due from him on "those accounts," that is, the accounts exhibited by him in compliance with a requisition under section 34 (*c*). The payment contemplated has to be made in compliance with a requisition under section 34 (*d*). A reference to section 34 shows that under clause (*c*), the guardian is under an obligation, if so required by the Court, to exhibit his accounts in Court at such times and in such form as the Court may from time to time direct; under clause (*d*), it is obligatory upon the guardian, if so required by the Court, to pay into Court at such time as the Court directs, the balance due from him (or so much of the balance as the Court directs) on those accounts, that is, the accounts exhibited on a requisition made under clause (*c*). In the case before us, on the accounts exhibited under section 34 (*c*), Rs. 186 only was due from the guardians. Consequently, the only order which the Court was competent to make was to call upon the guardians to bring into Court the sum of Rs. 186. As the requisition was not in conformity with section 34 (*d*), it is clear that no fine could validly be imposed on the guardians for failure to comply therewith.

The result is that this appeal must be allowed, the orders dated the 23rd April, 7th May and 6th June set aside, and the case remitted to the District Judge for reconsideration. Any sums realised from the appellant under the orders now discharged will be refunded to him. In the circumstances of this case we direct each party to pay his own costs up to this stage.

We find from the record that no security was taken from the appellant at the time of his appointment as guardian of the property of the infant or at any subsequent period. In view of the allegations, made against his management of the estate, it is obviously essential in the interest of the infant that he should not be allowed to continue as guardian of the property, unless he furnishes security to the satisfaction of the Court, and he has in this Court expressed his readiness to do so. We accordingly direct that within one month of the return of the record to the Court below, he do furnish security, to the extent of Rs. 1,500, to the satisfaction of the District Judge, and in such form as he may determine. The security so taken will cover the past management of the estate by the appellant

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as also his furture dealings therewith if he continues as guardian. If he fails to furnish security as now directed, he will stand removed from the guardianship. If he furnishes security and continues as guardian under the jurisdiction of the Court, his accounts will be scrutinised, and the charges brought against him will be investigated. If on examination it transpires that his management of the estate has been of such a character that he should not be allowed to remain in charge of the estate of the infant any longer, he will be removed. If, on the other hand, it transpires that although his conduct has not been wholly satisfactory he may yet be allowed to remain in possession of the estate as guardian, additional security, may, in the discretion of the District Judge, be taken from him for the protection of the estate. The sole point for consideration in cases of this description is the welfare of the infant and the matters mentioned will be investigated from that standpoint alone. We may, in this connection, refer briefly to another point which does not require detailed consideration in view of the order we have already made. When the Court decided to remove the guardians on the ground that they were not trustworthy and proceeded to appoint Mahesh Chandra Pal as guardian of the person and property of the infant, no enquiry was made as to his fitness. But it is eminently desirable that no person should be appointed guardian of the person or property of an infant, without some enquiry about his fitness for the office.

The accounts and papers already filed will remain in the custody of the Court; but all facilities will be given to both parties to have access to them under proper safeguard. We may finally add that as the appeal has been filed by Jagannath Panja alone, he will be restored as guardian under our orders. As his colleague was removed on his own application and has expressed no desire to undertake again the responsibilities of the office, the order of the District Judge will stand untouched in that respect.

A. T. M. *Appeal allowed.*

Before Sir John Woodroffe, Knight, Judge, and Mr. Justice Chaudhuri.

ANANDA MOHAN SAHA AND OTHERS

v.

ANANDA CHANDRA NAHA*.

CIVIL. 1916. May, 26, 27.

Document, execution and registration of—Document, alteration of, after registration—Alteration, if vitiates the document.

An alteration in a document after its execution and registration, made in good faith to carry out the original intention of the parties does not vitiate the instrument.

Appeal by Plaintiffs.

Suit for enforcement of a mortgage bond, which was executed by the defendant and duly registered. The interest set out in the bond was one rupee per mensem. After execution and registration plaintiffs added the words "per centum", and he accordingly framed his suit.

Defence *inter alia* was that the alteration completely vitiated the document.

The learned Munsiff and on appeal, the learned Subordinate Judge over-ruled the objections of the defendant, and gave the plaintiffs a decree for the principal with interest at one rupee per mensem but not according to the alteration.

Against the decision of the learned Subordinate Judge Defendant preferred an appeal to the High Court, and Mr. Justice Walmsley heard the appeal.

Babu Trailakhya Nath Ghosh for the Appellants.

Babus Jogesh Chandra Roy and *Asita Ranjan Ghosh* for the Respondent. 1915. March, 18.

C. A. V.

The following judgment was delivered by

Walmsley, J.—The defendant borrowed Rs. 200 from the plaintiff on mortgage, and executed a bond in which the interest was set out as one rupee per mensem. After execution and registration the plaintiff added the words "per centum," and in his plaint he asked for interest at one rupee per centum per mensem. The lower Courts gave him a decree for the principal with interest at one 1915. April, 12.

* Letters Patent Appeal No. 68 of 1915, against the decision of Mr. Justice Walmsley, dated the 12th April, 1915, in Appeal from Appellate Decree No. 4037 of 1913, against the decree of Babu Biraja Charan Mitra, Subordinate Judge at Faridpur, dated the 18th August, 1913, affirming that of Babu Hari Jiban Banerjee, Munsiff, 2nd Court, at Chikandi, dated the 18th July, 1912.

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rupee per mensem, that is, they over-ruled the defendant's contention that the alteration completely vitiated the document, but they would not give interest according to the alteration.

The defendant has preferred this appeal and it is contended on his behalf that the alteration rendered the bond absolutely void.

The learned Subordinate Judge appears to have held that the English rule about alterations in documents should not be applied in this case because it would be harsh to apply it; and that it is not applicable because the alteration was of a venial character, and because it was made to bring the document into agreement with the intention of the parties, and because it was made after the bond had been registered.

The learned Vakil for the respondent supports the judgment of the lower appellate Court on the grounds that the alteration is not of a material nature, that it was made to bring the bond into agreement with the intention of the parties, and inspite of the alteration the bond is evidence of the debt and of the creation of a charge upon the property mortgaged. The first question is whether the alteration is of such a nature as to fall within the English rule about alterations of documents. The English cases on the subject are to be found in the note on *Master* v. *Miller* (Smith's Leading cases Vol. I) and the case of *Leonard Worrington* v. *John Early* (1) is very useful for the purpose of the present case. There, in a promissory note the original stipulation was for 'lawful interest': subsequently the words "interest at six per cent. per annum" were added in the corner of the note, and the alteration was held to be 'fatal' and a 'material alteration of the contract'. On the authority of that case I hold that the alteration made by the plaintiff was of such a nature as to render the bond void under the English rule. It is not denied that effect is given to the English rule in this country, so I need not cite the cases bearing on this point.

Next comes the question whether the alteration can be sustained on the ground that it was made in order to bring the document into agreement with the original intention of the parties. The cases of *Cariss* v. *Tottersall* (2), *London and Provincial Bank* v. *Roberts* (3), and *In re Howgate and Osborn's Contract* (4) are quoted, but an examination of those cases shows that they are quite different from the present one. It cannot be inferred from the document as it stood originally that the interest was to be per centum, and external evidence to that effect is not admissible. The

(1) (1853) 2 E. and B. 763.
(2) (1841) 2 M. and Gr. 890.
(3) (1874) 22 W. R. 402 (Eng.)
(4) (1902) 1 Ch. D. 451.

last contention of the respondent is that the principle adopted in *Ramasamy Kon v. Chinnu Bhavani Ayyar* (1) is applicable, but that argument is disposed of by the remarks made in the Full Bench case of *Christacharlu v. Karibasayya* (2). In this case, also, the plaintiff's suit is founded "on the instrument as altered and on nothing else."

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I am of opinion that the decree of the lower appellate Court cannot be sustained. The application of the English doctrine may seem harsh to the plaintiff, but it is his own wrong and foolish act that has brought him into trouble. The only relief he can be allowed is that he should not be made to pay costs to a defendant who has escaped from a moral obligation on a technical plea.

The appeal is allowed, and the plaintiff's suit is dismissed, but the parties will bear their own costs in all Courts.

Against this decision Plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babus Jogesh Chandra Roy and *Asita Ranjan Ghosh* for the Appellants.

Babu Trailakhya Nath Ghosh for the Respondent.

The following judgments were delivered :

May, 17.

Woodroffe J.—This appeal has been heard at great length. The point which is raised is a simple one. The suit was brought on a mortgage bond of Rs. 200. The defence which has been found to be false is that money was not borrowed, that the bond was not executed or registered as the plaintiff alleges, but that the defendant with a view to defraud his own creditors got up a sham mortgage and in order that the benami character of this transaction should not be discovered, he made it over to the plaintiff who has taken advantage of the fact. Subsequently, it is alleged that there was a dispute between the plaintiff and the defendant about some tin-shed and other matters and the plaintiff then put in force this mortgage against the defendant. The defendant alleges that there was no consideration. It is further alleged that when the mortgage bond was in possession of the plaintiff, the mortgage being in terms one rupee per mensem, the plaintiff fraudulently inserted the words "per cent" in the bond thus making the interest from eight annas per cent. per annum to one rupee per cent. per annum. The defence of the benami character of the document was abandoned; and the learned Judge found that consideration had been received

(1) (1866) 3 Mad. H. C. R. 247. (2) (1885) I. L. R. 9 Mad. 399 (410).

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for this document as was evidenced by a previous deposition of the defendant. Thereupon stress was laid upon the alleged alteration in the document. It has been found as a fact that the document has been altered. It has also been found as a fact that there has been no fraud and that the document was not fraudulently altered. It has found as a fact too that it was the intention of the parties, as it seems to me to be obvious upon reading the document, that interest was to be paid at the rate of one rupee per cent. per mensem. Any body reading this document (rupee one per mensem) could not fail to read it in the sense in which both the Munsiff and the Subordinate Judge have done, namely, that interest was to be paid at the rate of one rupee per cent. per mensem. The finding is that this was the agreement between the parties, and in making this alteration effect was given to the common intention of the parties. It has been held as a matter of law, as has been pointed out in the judgment of the Subordinate Judge, that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. That is the rule of law and applying the facts found to this rule, the finding of the Subordinate Judge disposes of this question.

It is unnecessary therefore to consider the other point which has been raised on behalf of the appellant, namely, that apart from this question altogether there are a number of decisions which shows that as soon as a document is registered a charge is created in favour of the plaintiff and the plaintiff is entitled to enforce the charge and no alteration subsequent to the registration of the document can affect the validity of the document—a large number of cases has been cited in support of this proposition. It is unnecessary to decide that question because this case is disposed of upon the ground which I have already stated.

In my opinion the judgment and decree of Mr. Justice Walmsley should be set aside. I accordingly set aside the judgment and decree of Mr. Justice Walmsley and restore the judgment and dectee of the Subordinate Judge.

The appellants will be entitled to their costs of this appeal and of the hearing before Mr. Justice Walmsley from the respondent.

Chaudhuri, J.—I agree.

A. N. R. C. *Appeal allowed.*

Before Mr. Justice Fletcher and Mr. Justice Newbould.

PURNA CHANDRA CHABRI AND ANOTHER

v.

TARA PROSAD MAITI.*

Civil. 1916. August, 18.

Civil Procedure Code (Act V of 1908), Order XXXIII, Order XXXVIII, Rr. 5, 6—Application for leave to sue in forma pauperis, *pendency of—Attachment before judgment, order for, if legal.*

Where a plaintiff has applied for leave to sue in *forma pauperis*, a Court has no jurisdiction to pass an order of attachment before judgment under the provisions of Order XXXVIII of the Code of Civil Procedure without determining whether the leave of the Court should be granted to the plaintiff to sue in *forma pauperis.*

Dwarka Nath Narayan v. *Madhavrao Vishvanath* (1) followed.

Appeals by Defendants.

Plaintiff applied for leave to sue in *forma pauperis*, and before a judicial determination of that application, he applied to the Court for attachment of the defendants' property, and obtained an order of attachment before judgment under the provisions of order XXXVIII of the Code of Civil Procedure. Against the orders passed by the learned Subordinate Judge in connection with the attachment proceedings defendants preferred two appeals to the High Court.

Babu Karunamoy Basu (for *Babu Mohini Mohan Chatterjee*) for the Appellants.

Babu Satcowripati Roy for the Respondent.

The following judgments were delivered :

Fletcher, J.—These are two appeals from the orders passed by the learned Subordinate Judge of Midnapur. Appeal No. 391 is preferred against the orders dated the 20th June and the 16th July 1914 and appeal No. 426 is preferred against the order dated the 1st August, 1914. Appeal No. 391 is infructuous because the learned Judge subsequently passed an order cancelling the orders dated the 20th June and the 16th July 1914 against which that appeal has been preferred. That appeal is accordingly dismissed. We are now concerned only with appeal No. 426 which is preferred against the order of the 1st August, 1914. The plaintiff in this case has applied for leave to sue in *forma pauperis*. That application August, 18.

* Appeals from original orders Nos. 391 and 426 of 1914, against the orders of B. G. Basu Esq., Subordinate Judge, 1st Court, Midnapur, dated the 2nd June, 16th July, and 1st August, 1914.

(1) (1886) I. L. R. 10 Bom. 207.

CIVIL. 1916. Purna Chandra v. Tara Prosad. Fletcher, J.

has not yet been judicially determined; it is still pending before the Court. But before the determination of that application, the plaintiff applied to the Court and obtained an order of attachment before judgment under the provisions of Order XXXVIII, rules 5 and 6 of the Code of Civil Procedure. The learned Judge passed the present orders, the last one being the only one with which we are now concerned. The question is "Had the learned Judge jurisdiction to make an order in the suit attaching a portion of the defendant's property before judgment before he had determined whether the leave of the Court should be granted to the plaintiff to sue in *forma pauperis*?" The matter is perfectly clear on the rules that he had not. Until the Judge has determined whether or not the plaintiff should be permitted to sue as a pauper, there is no suit before the Court; it is merely an application. The rules laid down in Order XXXIII of the Code of Civil Procedure are quite clear on that. Order XXXIII rule 8 shows clearly that there is no suit in existence until the application to sue in *forma pauperis* has been granted. The matter is covered by judicial authority. If authority is required for the proposition, we need only refer to the decision of Wedderburn J., in the case of *Dwarka Nath Narayan* v. *Madhavrav Vishvanath* (1). Appeal No. 426 is, therefore, allowed and the order of the learned Judge of the Court below dated the 1st August 1914 set aside and the plaintiff's application for attachment before judgment rejected. The respondent must pay to the appellants their costs both in this Court as well as in the Court below. We assess the hearing-fee in this Court at three gold mohurs.

Newbould, J.—I agree.

A. N. R. C. *Order set aside.*

(1) (1886) I. L. R., 10 Bom. 207.

Before Mr. Justice Chaudhuri and Mr. Justice Walmsley.

CIVIL. 1916. December, 4.

ESTHER ISAC EZEKIEL MORDECAI

v.

MARTU MALL AND OTHERS.*

Equitable mortgage—Title-deeds, deposit of—Memorandum to the creditor to afford evidence of mortgage—Registration, if necessary.

* Appeal from appellate Decree No. 715 of 1915, against the decree of H. P. Duval Esq., District Judge of 24-Perganas, dated the 4th March, 1915, affirming that of Babu Sarada Prosad Baksi, Subordinate Judge at Alipore, dated the 13th August, 1913.

CIVIL.

1926.

Esther Isaac v. Marlu Mall.

When a memorandum creates a mortgage, it comes under the operation of the Indian Registration Act; but when there is a deposit of title-deeds independently of it, the deposit may create an equitable mortgage, and the memorandum need not be registered.

Kedar Nath Dutt v. *Sham Lal Khettry* (1), *Oo Noung* v. *Moung Htoon Oo* (2) and *Gokul Das* v. *The Eastern Mortgage and Agency Company Limited* (3) followed.

Appeal by Defendant No. 2.

This appeal arose out of a suit brought for realisation of Rs. 3524-2-8p. by the enforcement of an equitable mortgage created by the defendant in Calcutta in respect of certain properties situate at Dum Dum in the district of 24-Perganas.

Plaintiff's allegation was that their predecessor-in-interest Sewdutt Roy advanced Rs. 2,000 to the defendant No. 1 on two promissory notes executed by the latter; that the loans were taken for the benefit of both defendant No. 1, and his wife, defendant No. 2; that defendant No. 1 having wanted a further advance of Rs. 500, it was arranged that defendant No. 2 who had certain properties at Dum Dum would deposit her title-deeds with the said Sewdutt Roy as security; that the said title-deeds having accordingly been deposited with him a further advance of Rs. 500 was taken, and also a promissory note was executed by the defendant No. 1, and after that a memorandum was given to the said Sewdutt as a further evidence of the mortgage; and that this transaction took place within the town of Calcutta. The memorandum ran to this effect:—"Dear Sir, as desired we send herewith title-deeds of our premises at Dum Dum as security against your advance to us. Please hold them as collateral security and oblige. Yours faithfully, Esther I. E. Mordecai, I. E. Mordecai."

Defence *inter alia* was, that the defendant No. 1 alone took the money and executed the handnotes (more than three years ago), that his wife had nothing to do with them; that the title-deeds of the property in suit were made over to Sewdutt only for inspection as the latter was thinking of purchasing it; that the memorandum or *chit* was signed by them without understanding the nature of the contents thereof, and that there was no valid mortgage as the said memorandum was not registered.

The Courts below overruled the contention of the defendants, and holding that there was a valid equitable mortgage decreed the suit against both the defendants. Hence the appeal.

(1) (1873) 11 B. L. R. 405; 20 W. R. 150.

(2) (1886) I. L. R. 13 Calc. 322. (3) (1905) 4 C. L. J. 102.

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December, 4.

Sir Rash Behary Ghosh and *Babu Bepin Behary Ghosh* for the Appellant.

Babus Mohendra Nath Roy and *Rupendra Kumar Mitra* for the Respondents.

The judgment of the Court was as follows:

It has been clearly found by both the Courts below that the title-deeds were made over to Sew Dutt Roy on the 25th February 1909, for the purpose of ascertaining whether there was sufficient security for the advances already made and a further advance to be made and which had been asked for by the 1st Defendant, Mr. Mordecai. The learned Subordinate Judge in his judgment says that he cannot avoid the inference that the security offered, was approved and accepted and then the advance was made on the 1st March. As to the memorandum (Exhibit IV), he says, "it might be signed on the 1st March or two or three days after." The learned Judge in appeal was satisfied that the title-deeds were made over for the purpose of inspection of the property on the 25th February, that a good mortgage was created by the deposit of the title-deeds and that the memorandum was purely a memorandum which did not need registration.

The law on the subject has been laid down for years in this Court and it is clear that when a memorandum creates a mortgage, it comes under the operation of the Registration Act; but when there is a deposit of title-deeds independently of it, the deposit creates the mortgage and the memorandum need not be registered. That has been enunciated in the case of *Kedar Nath Dutt* v. *Sham Lal Khettry* (1) followed subsequently in numerous cases, among them, in *Oo Noung* v. *Moung Htoon Oo* (2); *Gokul Das* v. *The Eastern Mortgage and Agency Company Limited* (3).

The second point urged before us also fails upon the findings arrived at by the Courts below. We think that the decree made is good in form and in law.

The appeal is dismissed with costs.

A. N. R. C. *Appeal dismissed.*

(1) (1873) 11 B. L. R. 405; 20 W. R. 150.
(2) (1886) I. L. R. 13 Calc. 322.
(3) (1905) 4 C. L. J. 102.

CIVIL RULE.

Before Mr. Justice Richardson and Mr. Justice Smither.

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1916.
August, 25.

KALI KANTA CHUCKERBUTTY

v.

SHYAM LAL DAS BASU AND OTHERS.*

Civil Procedure Code (Act V of 1908), Order XXI, R. 92, Order XLIII r. (1) (j)—Application to set aside a sale—Dismissal for default—Appeal.

An order dismissing for default an application to have a sale set aside, is an order within the meaning of Order XXI, R. 92 of the Code of Civil Procedure, and as such an appeal lies against such an order under order XLIII r. (1) *(j)* of the Code.

Broja Sundar Roy Chowdhury v. *Moti Lall Masumdar* (1) and *Kumud Kumar Bose* v. *Hari Mohan Samaddar* (2) referred to.

Application by the Auction purchaser.

In execution of an exparte decree, the decree-holder, Panna Lal Dass, brought to sale certain properties of the judgment-debtor, Shyam Lal Das Basu. The judgment-debtor thereupon applied to have the sale set aside under order XXI, rule 90 of the Civil Procedure Code. After various adjournments, the application to set aside the sale was dismissed for default. Against the order of the executing Court dismissing the application for default, the judgment-debtor preferred an appeal to the District Judge. The appellate Court having held that an appeal lay in the case, set aside the order of dismissal for default, and remanded the case to the Court of first instance for admission of evidence and disposal on the merits. Against that order the auction-purchaser, Kali Kanta Chuckerbutty moved the High Court under section 115 of the Code of Civil Procedure, and obtained the Rule.

Babu Jyotish Chandra Hazra for the Petitioner.

Babu Jitendra Nath Das Gupta for the Opposite Party.

The following judgments were delivered :

August, 25.

Richardson, J.—This is a Rule by which the opposite party was called upon to show cause why the order of the District Judge of Backergunge, dated the 11th March, 1916, should not be set aside. The order was made in the following circumstances.

In execution of a decree for rent passed on the 29th June 1914, the holding in arrears was sold on the 9th March, 1915. The

* Civil Rule No. 376 of 1916, against an order of P. E. Cammaide Esq., District Judge of Backergunje, dated the 11th March, 1916, reversing the order of T. Banerjee, Esq. Munsiff, 1st Court, at Pirozepur, dated the 5th July, 1915.

(1) (1910) 14 C. W. N. 573. (2) (1915) 21 C. L. J. 628.

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Richardson, J.

judgment-debtor then applied under order XXI, rule 90, to have the sale set aside. After some adjournments, the learned Munsif in the first Court, on the 29th May, 1915, directed that the case should come on for final hearing on the 19th June, 1915, and stated that no further adjournment would be granted. On the 19th June 1915, the judgment-debtor did not appear and the application to have the sale set aside, was therefore dismissed for default. From that order, the judgment-debtor appealed to the District Judge and the District Judge, upon the appeal, made the order complained of.

In support of the Rule obtained by the auction-purchaser of the holding, it has been argued that no appeal lay to the District Judge and that the proper course was for the judgment-debtor, the opposite party before us, to apply to the Munsif under order IX, rule 9 to have the dismissal order set aside.

It may be that it was open to the opposite party to take that course: *Bhuban Behary Nag Mazumdar* v. *Dhirendra Nath Banerji* (1); but it would also seem that if he had taken that course and if his application to have the order of dismissal set aside had been dismissed, he would have had no right of appeal under order XLIII (1) (*c*) of the Code: *Charu Chandra Ghosh* v. *Chandi Charan Ray Chowdhury* (2). In our opinion, the course which he actually took, was also open to him. The order, though it was an order dismissing the application to have the sale set aside for default, was still an order within rule 92 of order XXI. Under order XLIII (1) (*j*), an order under rule 92 of order XXI, setting aside or refusing to set aside a sale, is appealable. The language of order XLIII (1) (*j*) is thus wide enough to cover a case where an application to have a sale set aside is dismissed for default. In support of this position, we may refer to the cases of *Broja Sundar Roy Chowdhury* v. *Moti Lall Mazumdar* (3) and *Kumud Kumar Bose* v. *Hari Mohan Samaddar* (4). In our opinion, therefore, it cannot be said that no appeal lay to the District Judge, and we are accordingly unable on the ground suggested to interfere with the order made by him.

It is unnecessary to decide whether if the appeal had come before us, we should have made the order which the learned District Judge has made. He has set aside the order of dismissal for default and remanded the case for the admission of evidence

(1) (1916) 20 C. W. N. 1203. (2) (1914) 19 C. W. N. 25.
(3) (1910) 14 C. W. N. 573. (4) (1915) 21 C. L. J. 628.

and disposal on the merits. That order was one which the District Judge had jurisdiction to make and we express no opinion on the question whether his discretion was rightly or wrongly exercised.

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Richardson, J.

It was further argued that the application to have the sale set aside was made out of time. That may be so, or it may not. The question is one which it will be for the Munsif to decide when he rehears the case. On the materials before us, it would not be right that we should deal with this point.

The result is that the Rule must be discharged. Costs will abide the result. We assess the hearing-fee at three gold mohurs.

Smither, J.—I agree.

A. N. R. C. *Rule discharged.*

FULL BENCH.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, Sir Asutosh Mookerjee, Knight, Judge, Mr. Justice Chaudhury and Mr. Justice Newbould.

CHARU CHANDRA MAJUMDAR

v.

THE EMPEROR.*

CRIMINAL.
1916.
November, 18, 20. December, 1, 4, 5.

Criminal Procedure Code (Act V of 1898), Sec. 185—Prosecution instituted in a Court subordinate to another High Court—'Doubt'—'Shall'—Difference between sections 185 and 527 of the Code of Criminal Procedure.

Per Curiam: The High Court has jurisdiction to make an order under section 185 of the Code of Criminal Procedure in respect of an enquiry instituted or trial commenced in a Court situated beyond its territorial limits.

Per Sanderson C. J., Mookerjee, Chaudhuri and Newbould JJ. (*Woodroffe J. Contra*): Where jurisdiction is given to more Courts than one for the same offence, if a doubt arises as to the Court by which such offence should be tried, it involves a doubt as to the suitability of one Court as compared with another from the point of view of *convenience* and *expediency.*

Per Woodroffe and Newbould JJ.: In a matter of convenience the Court should consider not only the interests of the accused but also of the prosecution and its witnesses.

* Full Bench Reference in Criminal Revision No. 848 of 1916, with Miscellaneous Case No. 92 of 1916.

CRIMINAL.

1916.

Charu Chandra v. The Emperor.

Per Woodroffe J.: Section 185 of the Code of Criminal Procedure is not designed to cut down admitted jurisdiction, but to determine cases where the facts said to constitute jurisdiction are doubtful. There must also be facts on which a doubt can arise.

The word 'should' in section 185 is possibly ambiguous and may apply to the suitability of a particular Court as well as its competency.

Per Mookerjee, J.: The word 'should' in section 185 means 'ought.'

Per Woodroffe J.: Section 185 of the Code of Criminal Procedure does not deal with transfer or decisions on the ground of mere convenience raised by the accused but with doubt as to competency. The Court cannot under the section consider the question of convenience merely.

Per Mookerjee, J.: The scopes of sections 185 and 527 are different. Under the former section, the High Court, within the limits of whose appellate criminal jurisdiction the offender actually is, merely decides by which Court the offence shall be enquired into or tried. The order made is not in terms an order for transfer, though, no doubt, the resultant effect may be the same. Section 527, on the other hand, invests the Governor-General in Council with power to make an actual order for transfer. The order is an executive order which may be made without opportunity afforded to the accused to be heard. The section contemplates an order for transfer.

Per Mookerjee, J: Jurisdiction cannot be conferred by consent of parties, where there is an entire absence of jurisdiction.

Section 185 of the Criminal Procedure Code is not restricted to proceedings instituted in a Court subordinate to the High Court where the application is made. The section invests that High Court with authority to determine the question, within the local limits of whose appellate criminal jurisdiction the offender actually is.

If the offence is triable by any one of two or more Courts subordinate to different High Courts, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, is competent to entertain the application.

Section 185 is not restricted to cases where a doubt arises as to the jurisdiction of the trial Court by reason of some uncertainty regarding the facts or the law applicable to the case.

Hiran v. *Mangal* (1) and *Emperor* v. *Chaichal* (2) approved. *Rajani* v. *All-India Banking and Insurance Co.* (3) dissented from.

Reference to Full Bench.

A Rule was issued by Sanderson C. J. and Smither J. on the 14th August, 1916, calling upon the District Magistrate of Karwar, in the Presidency of Bombay, District Canara, to show cause why the proceedings should not be transferred to the Court of the Chief Presidency Magistrate in Calcutta and the alleged offence

(1) (1912) 17 C. W. N. 761. (2) (1909) 9 Cr. L. J. 581.
(3) (1913) I. L. R. 41 Calc. 305; 17 C. W. N. 1207.

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enquired into and tried in Calcutta, with a direction that the Rule should be sent to the Registrar of the High Court in Bombay for favour of its transmission by him to the District Magistrate.

The applicant for the Rule was the Managing Agent and a Director of the Bharat Luxmi Provident Company, Limited, carrying on business at its registered head quarter at Clive Street, Calcutta, and he resided within the local limits of the appellate criminal jurisdiction of the Calcutta High Court. Proceedings against him and one of the Company's agents were instituted at a place called Karwar in the Kanara District of the Presidency of Bombay under sections 409 and 420 of the Indian Penal Code.

The Rule came on for hearing on the 16th November, 1916, before Chaudhuri and Newbould JJ., who passed the following orders.

November, 16.

Chaudhuri, J.—I would make the Rule absolute and transfer the case on the following grounds:

I do not clearly understand what the charge really is against the petitioner. The explanation of the Magistrate of Karwar on this point is vague and somewhat shadowy. The notes made by the District Superintendent of Police contained in a document headed "points to refute" do not give much help. Mr. Camell appearing on behalf of the Crown states he has not sufficient instructions in the matter and can give no further help. The accused has not been able to get from the prosecution any particulars relating to the nature of the charge. The record of the criminal case consists of the charge-sheet which does not state the case. I consider the evidence of the witnesses mentioned by the Magistrate is likely to be of a formal nature. Admittedly the case depends mostly on documentary evidence, and the books of the Company. The accused is the principal officer in charge of the Company which has its main office in Calcutta. His removal and the removal of his books, would mean the stoppage of the business, which involves the interest of a large number of policy-holders. The affairs of the Company are also under investigation by the Registrar in Calcutta. Weight ought to be attached to the offer of the defence to bear the expense of the examination of necessary witnesses in Calcutta. The accused also suggests that a commission may be issued for the examination of the Karwar witnesses. The prosecution has been undertaken and the expense is being borne by the Crown. It is to be noted that section 185 provides a safeguard so far as the accused is concerned, namely, to prevent his harassment. The case against the sub-Agent was started sometime ago at Karwar, and it seems to me that the prosecution had ample

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time to be able to frame or indicate the nature of the case against the accused. The indefinite character of the case taken with the other circumstances, specially the stoppage of the business of the Company, appears to me to be sufficient ground for transferring the case to Calcutta, specially as the doubt on the question of jurisdiction arises from the failure on the part of the prosecution to define the nature of the charge.

Newbould, J.—I hold that on the merits the Rule must be discharged. I quite appreciate that it would be far more convenient for the petitioner to be tried in Calcutta. But we have to consider the balance of convenience and the interests of justice and it would be a greater hardship to the prosecution witnesses to compel them to attend a trial here, on the following grounds :

A large number of these witnesses are poor and illiterate and not conversant with any language except their mother tongue, while the petitioner is an educated gentleman of means. He has offered through his counsel to bear the extra expense that the trial of the case in Calcutta would involve. But the trouble that will be caused to witnesses of this class by keeping them in a strange country, 1800 miles from their home, for a considerable period could not be suitably remedied by monetary compensation. It is contended that they are not important witnesses and might be examined on commission. Our attention has been drawn to a remark of the Magistrate, Karwar town, in his order of the 31st July, to the effect that the case against the petitioner seems to depend mostly on documentary evidence. In passing this order the Magistrate was, it appears, only considering the question of bail. I do not think the Magistrate meant more than that the proof of criminal liability of the petitioner would principally depend on documentary evidence. It will have to be proved in the presence of the petitioner, before he can be convicted, that the offences charged have been committed, as well as his personal criminal liability. Proof of the commission of those offences will depend directly on the evidence of these ignorant witnesses. I do not think that this issue could be fairly tried on evidence taken on commission. As regards the removal of the books of the Company, whether the case is tried in Calcutta or at Karwar, there must be serious interference with the work of the Company. The extra inconvenience that will be caused by removing the books to a Court at a greater distance is not in my opinion sufficient to justify the transfer of the case.

I am, therefore, of opinion that a transfer of this case will neither

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promote the ends of justice, nor tend to the general convenience of parties or witnesses and I would accordingly discharge this Rule.

The matter was then referred to the Full Bench by Chaudhuri and Newbould JJ. by the following

ORDER OF REFERENCE.

This is a Rule calling upon the District Magistrate of Karwar in the Presidency of Bombay to shew cause why the proceedings against the petitioner should not be transfered to the Court of the Chief Presidency Magistrate, Calcutta, and the alleged offence enquired into and tried in Calcutta, or why such other order should not be passed as to this Court many seem fit and proper.

This Rule was issued in exercise of the Court's powers under section 185 of the Code of Criminal Procedure, and one of the points to be considered is, what powers we have under this section. This section is in the following terms :—"Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this chapter be enquired into or tried, the High Court within the local limits of whose jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into, or tried." In the case of *Rajani Benode Chakravarti* v. *All-India Banking* and *Insurance Co.*, (1) it was held by a Divisional Bench of this Court consisting of their Lordships Imam and Chapman JJ., that section 185, Criminal Procedure Code, did not warrant interference by this Court on the ground of convenience, when two Courts were equally competent to exercise jurisdiction in the matter. But in the case of *Hiran Kumar Chowdhury* v. *Mangal Sen* (2); another Divisional Bench of this Court consisting of their Lordships Chitty and Richardson, JJ., granted a similar application. They held that they might properly make an order under this section transferring a case from the Court in another province where it had been instituted to a Court in this province on the ground of convenience, when the Court at either place would have jurisdiction. The only other ruling on this point that we have been able to discover is that of *Emperor* v. *Chaichal Singh* (3), which was cited on behalf of the petitioner. In that case it was held that the section is not restricted to cases in which there is doubt as to whether one Court or another has jurisdiction, but includes cases in which the doubt is on the point whether the choice between the two Courts, both of which have jurisdiction, should be decided on the ground

(1) (1913) I. L. R., 41 Calc., 305; 17 C. W. N. 1207.
(2) (1912) 17 C. W. N. 761.
(3) (1909) 5 L. B. R. 17; 9 Cr. L. J. 581.

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of general convenience. In our opinion this view is correct. We think with due respect that the learned Judges who decided the case of *Rajani Benode Chackravarti* v. *The All-India Banking* and *Insurance Company* (1); overlooked the effect of the words "should under the preceding provisions of this chapter be enquired into and tried" in section 185. A reference to the preceding sections shows that a question of doubt as to jurisdiction can seldom arise, as provision is made that in the event of circumstances, which otherwise would have made it doubtful where the trial should be held it can be held in any of the several Courts to whom jurisdiction is given by these sections. But these provisions giving jurisdiction to more Courts than one for the same offence must necessarily create a possibility of doubt as to which Court can more conveniently in the interests of public justice exercise that jurisdiction. It seems to us that "the doubt as to the Court by which any offence should under the preceding provisions be enquired into or tried" includes, in the ordinary sense of the words, a doubt as to the suitability of one Court compared with another and is not limited to a doubt as to jurisdiction. We are, therefore, substantially in agreement with the decision of this Court in the case of *Hiran Kumar Chawdhury* v. *Mangal Sen* (2). Our only doubt is as to the correctness of the form of the order made in that case, that is to say, whether we could expressly order the transfer of the case from a Court outside our jurisdiction to one within it. If we made an order under this section we think it ought to be of a declaratory nature, leaving it to the prosecution to take the necessary steps to enable the Court of the Chief Presidency Magistrate to assume jurisdiction.

As this case involves an important question of jurisdiction when the two reported decisions of this Court have taken practically opposite views, we think it is a fit case for reference to a Full Bench of this Court, under Part II, chapter V, Rule V of our rules, for such orders as to such Bench may seem fit.

We have also to state that we are not agreed on the question of convenience and append our separate judgments on that point.

We agree that as the matter is being referred to a Full Bench, that Bench should also consider the question of convenience, if necessary, to decide it, instead of having a separate reference to a third Judge. The points, therefore, for the determination of the Full Bench are as follows :—

(1) (1913) I. L. R. 41 Calc. 305. (2) (1912) 17 C. W. N. 761.

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1. Is the decision in *Rajani Benode Chakravarti* v. *All-India Banking and Insurance Co.*, (1) correct?

2. Is the form of the order in *Hiran Kumar Chowdhury* v. *Mangal Sen* (2), correct? If not, what is the correct form of the order?

The further point for consideration is—

3. Has the accused made a sufficient case for an order under Section 185, Criminal Procedure Code, on the ground of convenience?

Mr Norton (with him *Mr. Avetoom*, *Babus Atulya Charan Bose*, *Manmatha Nath Mookerjee*, and *Charu Chandra Biswas*) for petitioner: The question turns on the construction of section 185 of the Code of Criminal Procedure, which is one of a series of sections commencing with section 177. Reads section 177.

[Sanderson C. J. That gives the keynote to this chapter. So it is essential to know what the exact charge is against the petitioner].

Exactly. The only definite information in the charge here is the numbers of the sections 409, and 420, Indian Penal Code.

After section 177, Criminal Procedure Code, the next important section is 179, which must be read with section 185. The "consequence" in section 179 must be a consequence which is a component part in the building up of the offence. Upon this point there is a distinct conflict of authority, and that raises a "doubt", especially in connection with the charge under section 409, Indian Penal Code, if not section 420. Refers, on one side, to *Queen-Empress* v. *O'Brien* (3); *Emperor* v. *Mahadeo* (4); *Langridge* v. *Atkins* (5); and on the other, *Ganeshi Lal* v. *Nand Kishore* (6); *Re Rambilas* (7); *Krishnamachari* v. *Messrs. Shaw, Wallace & Co.* (8); *Gokulchand* v. *Phulchand* (9) and *Babulal* v. *Ghanshyam Das* (10).

[Sanderson C. J. Is there any case which decides a point like this, where both parties are in Calcutta, say, when all the transactions take place, but a week before the alleged misappropriation the person defrauded goes to Bombay?]

(1) (1913) I. L. R. 41 Calc. 305; 17 C. W. N. 1207.
(2) (1912) 17 C. W. N. 761.
(3) (1896) I. L. R. 19 All. 111.
(4) (1910) I. L. R. 32 All. 397.
(5) (1912) I. L. R. 35 All. 29.
(6) (1912) I. L. R. 34 All. 487.
(7) (1914) I. L. R. 38 Mad. 639.
(8) (1915) I. L. R. 39 Mad. 576.
(9) (1909) 11 Cr. L. J. 253.
(10) (1908) 7 Cr. L. J. 394.

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It may come within *Queen Empress* v. *O'Brien* (1).

[Mookerjee J. points out that the case is met by section 181 (2), Criminal Procedure Code].

Refers to *Emperor* v. *Mahadeo* (2), and *Langridge* v. *Atkins* (3).

[Sanderson C. J. In *Emperor* v. *Mahadeo* (2), the agent went out of Mirzapore to different places. Here it is not suggested that the accused ever went out of Calcutta].

No. Refers to section 182, Criminal Procedure Code. The word "area" has been defined to include all places where the Code applies: *In the Matter of Bichitranund Dass* (4) and *Punardeo* v. *Ram Sarup* (5).

Coming, then, to section 185, there is a conflict between *Rajani Benode* v. *All-India Banking Co.* (6), and *Hiran* v. *Mangal* (7). *Rajani Benode* v. *All-India Banking Co.* (6) is wrong, because it omits all reference to the words "under the preceding sections", and the Judges confine themselves only to the question of legal jurisdiction. The preceding sections incorporate amongst others sections 182, 181 and 179.

[Woodroffe, J.—Refers to section 527].

That section only gives an additional power, with concurrent jurisdiction. Refers to *Emperor* v. *Chaichal* (8), bottom of page 582. "Doubt" includes doubt as to convenience.

[Woodroffe, J.—Would the word "doubt" be appropriate to use, if it is only a doubt as to convenience, and not as to jurisdiction ?]

There is no reason why it should not.

[Woodroffe J.—Is not your argument met by the very words "the preceding provisions of the Chapter"? Those provisions do not refer to the question of convenience.]

[Sanderson C. J. Justices Imam and Chapman do not go upon the ground that the jurisdiction of this Court is confined to Bengal, but on the ground of convenience].

That is so: so that all the judges are agreed that section 185 is not limited to cases within this province.

[Woodroffe J. Have we ever exercised the power under

(1) (1896) I. L. R. 19 All. 111.
(2) (1910) I. L. R. 32 All. 397.
(3) (1912) I. L. R. 35 All. 29.
(4) (1889) I. L. R. 16 Calc. 667.
(5) (1898) I. L. R. 25 Calc. 858; 2 C. W. N. 577.
(6) (1913) 17 C. W. N. 1207; I. L. R. 41 Calc. 305.
(7) (1912) 17 C. W. N. 761.
(8) (1909) 9 Cr. L. J. 581 (582).

section 185 before these reported cases, ever since the establishment of High Courts ?]

Probably office in Bombay.

[Woodroffe J. Suppose the order is not obeyed, how can you enforce it ?]

The contingency is not likely to arise.

[Mookerjee J. Suggests that it is possible to reconcile section 185 with section 527. Section 185 does not entitle the Court to make an *order of transfer*, but only to *decide*. Suppose the Bombay High Court does not carry out the order, the party may then go up to the Government under section 527.]

That is so. Probably the earlier case *Hiran* v. *Mangal* (1) was not brought to the notice of the Judges in the later case *Rajani Benode* v. *All-India Banking Co.* (2).

[Chaudhuri J. But Imam J. issued the Rule in the earlier case.]

[Mookerjee J. I feel another difficulty as to section 185, namely as to the meaning of the words "actually is." Actually *is*—at what moment ?]

[Woodroffe J. Would not the effect of your argument be to lock up the administration of criminal justice in the country ? In every case, one High Court might be invited to say that the other High Court should try the case.]

Why not, if there is a preponderating balance of convenience ?

[Sanderson C. J. Do you base your case on the ground of convenience ?]

Not wholly: so far as section 409 goes, also on the question of jurisdiction.

[Woodroffe J. The "doubt" must be not a doubt *whether* an offence has been committed, but *where* the offence has been committed. So we must first know what the offence is. But if there are no materials for that, how does section 185 apply ?]

Refers to section 179.

[Chaudhuri J. Is it not the object of section 185 to protect the accused against harassment ?]

That is so. Referring to the points referred, submits, first, that *Rajani Benode* v. *All-India Banking Co.* (2) has not been correctly decided. The second point is conceded by the Crown. The third point relates to convenience: Convenience is not merely personal convenience, but also general convenience or expediency.

(1) (1912) 17 C. W. N. 761. (2) (1913) 17 C. W. N. 1207.

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The interests of the Company require that the case should be tried, if at all, in Calcutta. Points out, further, that the case admittedly rests on documentary evidence, and refers to the enquiry by the Registrar of Societies, which is still going on, under the provisions of the Provident Societies Act.

Mr. Camell for the Crown: Mr. Norton concedes that so far as the charge under section 420, Indian Penal Code is concerned, the Bombay Court has jurisdiction.

[Sanderson C. J. Not quite so far as that: but only if a charge under section 420 could be made out. What is that charge ?]

Confesses he is in a difficulty to formulate the charge. Reads paragraphs 18 and 19 of the Magistrate's explanation. The representation by prospectuses and the delivery of the money occurred in Bombay, so the offence of cheating is clearly triable in Bombay. So far as section 409 is concerned, the petitioner could be charged under that for abetment only in Bombay.

[Sanderson C. J. I think he could be also tried in Calcutta under section 420. The accused never left Calcutta.]

That may be so. The contention on the other side appears to be that a doubt arises only as to section 409.

[Woodroffe J. What do you mean ? What's the doubt ?]

Doubt whether the Bombay Court has jurisdiction to try the offence under section 409. Submits that this Court should interfere, if at all, only so far as the charge under section 409 is concerned.

[Woodroffe J. Clear up the doubt as to section 409. What are the allegations on which the charge is founded, assuming, of course, that the facts alleged exist ?]

Submits that he has no definite instructions beyond what appears in the papers.

[Sanderson C. J. When the facts are in such a state of flux that we ourselves are in doubt which High Court has jurisdiction, does not section 185 apply ?]

It would be premature now to formulate the charge. Concedes that section 185 would apply, if the Court thinks that there is a doubt where the actual offence is committed. But "doubt" in section 185 cannot include the element of convenience. The "preceding provisions" of the chapter do not refer to the question of convenience.

[Mookerjee J. But is not convenience implied in every one of the sections, except in the opening words of section 182, which only contemplate a doubt on facts ?]

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These sections do not occur in the chapter dealing with transfer of cases on the ground of convenience. As to transfer on that ground, section 527 is quite sufficient.

[Mookerjee J No, for the accused gets no hearing under section 527.]

[Chaudhuri J. Section 527 deals only with administrative convenience, and does not contemplate a judicial order. Are you not overlooking section 526 (1) (*d*) ?]

[Sanderson C. J. directs a translation of the vernacular Police charge-sheets.]

The question of jurisdiction does not arise at all on this Reference, which is limited only to the question of convenience, on which alone the Judges are disagreed. Refers to High Court Rules, Appellate Side, Chapter V, paras 5 and 1. The referring Judges do not disagree on the question whether the doubt is a doubt as to jurisdiction.

[Mookerjee J. But what is referred to the Full Bench is the *whole* "*case.*"]

Reads the translation of the first charge-sheet.

[Sanderson C. J. Do you say it is a criminal charge ? It might merely imply a breach of contract.]

It is an indication of the charge that could be drawn against the accused : all that can be said is that a criminal charge was intended.

Referring to the second charge-sheet, in which the Police is the complainant, admits that the charge which is one of swindling Companies is very vague and indefinite.

Going back to the question of convenience, submits that the element of convenience is not contained in any of the sections preceding section 185 : convenience is dealt with only in Chapter 44.

Explains the scheme of Chapter 15 of the Criminal Procedure Code. Section 177 is a general section indicating jurisdiction : sections 178 to 184 are in the nature of exceptions, dealing with special cases ; but all of them dealing with the question of legal competence or jurisdiction.

[Sanderson C. J. Take section 182, the second sentence : what question can arise there except one of convenience ? The presumption is that the offence is committed partly in area A, partly in area B : therefore, it may be tried in either place. Then, suppose the accused comes up under section 185 ?]

Submits that in that case section 185 does not apply, for if the offence may be tried partly in area A and partly in area B, then there is no doubt in the matter. The same view is foreshadowed in the Order of Reference. Concedes that if on the facts there is a

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doubt whether the trial should take place in Bombay or in Calcutta, section 185 would apply.

[Woodroffe J.—Do I take it that you do not contest that section 185 would apply, as regards the question of jurisdiction, in the case of Courts outside the limits of this Presidency ?]

Submits that the point is one of difficulty.

[Woodroffe J.—Your argument is limited merely to the question whether the doubt is a doubt as to jurisdiction or a doubt as to convenience ? The fact that it is the Court of Bombay does not affect your argument.]

No, it does not.

Dealing with the cases cited by Mr. Norton, points out that in *Queen Empress* v. *O'Brien* (1), the question was one entirely of jurisdiction, and not of convenience. *Empress* v. *Mahadeo* (2) is a very similar case. The case in *Babulal* v. *Ghanshyam Das* (3) was also a case under section 185, and the point was one of jurisdiction, not of convenience. Refers also to *Langridge* v. *Atkins* (4); *Ganeshi Lal* v. *Nand Kishore* (5); *Re Rambilas* (6); *Krishnamachari* v. *Messrs Shaw, Wallace & Co.*, (7) and *Gokulchand* v. *Phulchand* (8).

[Chaudhuri, J. What is the meaning of the word "should" in section 185 ?]

"Should", is not to be read as distinguished from "could": "should" means "shall."

[Sanderson C. J. Is not the word used advisedly in the sense of "ought to be ?"]

To read "should" as distinguished from "could" would be to ignore section 527.

Referring to the words "under the preceding provisions" in section 185, submits that section 185 may not apply to every one of the preceding sections.

Refers to the course of legislation on the subject. Section 185 of the present Code is the same as section 185 of Act X of 1882, which corresponded to section 69 of Act X of 1872.

In the Code of 1872, the section occurs in Chapter XI, which also contains section 64, corresponding to the present section 526: Section 64 A, which was introduced by Act XI of 1874, corresponded to present section 527.

(1) (1896) I. L. R. 19 All. 111.
(2) (1910) I. L. R. 32 All. 397.
(3) (1908) 7 Cr. L. J. 394.
(4) (1912) I. L. R. 35 All. 29.
(5) (1912) I. L. R. 34 All. 417.
(6) (1914) I. L. R. 38 Mad. 639.
(7) (1915) I. L. R. 39 Mad. 576.
(8) (1909) 11 Cr. L. J. 253.

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In the Code of 1882, sections 526 and 527 are relegated to a different chapter, and in section 185 the significant words "under the preceding provisions of this chapter" are added. These words were meant to indicate that the question of convenience was not to be considered in an application under section 185.

[Chaudhuri, J. At what stage is an application to be made under section 185 to the High Court? It cannot contemplate an application after proceedings are instituted.]

The words are wide, "inquired into or tried."

[Sanderson C. J. The time must refer to a time antecedent to the trial.]

[Woodroffe, J. Then, what are the materials on which we are to proceed?]

[Sanderson C. J. These must be the facts to be supplied by the prosecution.]

[Woodroffe, J. Supposing the application has to be made before the inquiry or trial takes place, what are the materials on which the doubt could possibly arise?]

The complaint.

[Sanderson C. J. Or, the statement of case given by the prosecution.]

As to the merits, admits that the charge is of an indefinite nature. But indefiniteness of the charges was not a ground on which the rule was issued or prayed for.

[Woodroffe, J. Is not the position curious? The charge is vague and indefinite: on what materials must we decide which Court should try?]

Mr. Norton in reply.

December, 4.

Sanderson, C. J.—In this case a Rule was issued by this Court on the 14th August, 1916, calling upon the District Magistrate of Karwar (in the Presidency of Bombay, District North Canara), to shew cause why the proceedings should not be transferred to the Court of the Chief Presidency Magistrate in Calcutta, and the alleged offence enquired into and tried in Calcutta, or why such other order should not be passed in the matter as to this Court may seem fit and proper on the grounds mentioned in the petition:

With a direction that the Rule should be sent to the Registrar of the High Court in Bombay for favour of its transmission by him to the District Magistrate.

The Rule was served with the assistance of the Registrar of the Bombay High Court, upon the local Magistrate and the Rule came up for argument before Chaudhuri and Newbould, JJ., during the vacation.

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The questions at issue were (1) whether the learned Judges had Jurisdiction under section 185 of the Code of Criminal Procedure to make the Rule absolute, (2) if they had such jurisdiction whether it should be exercised, and (3) if it were so exercised, in what form the order should be made.

The learned Judges were agreed on the question of jurisdiction but were unable to agree as to the manner in which it should be exercised. They expressed the opinion that as the case involved an important question of jurisdiction, and as the Court in two reported decisions, viz., *Hiran Kumar Chowdhury* v. *Mangal Sen* (1) and *R. B. Chakravarti* v. *All-India Banking and Insurance Company* (2) had apparently taken opposite views, they considered it a fit case for reference to a Full Bench, and expressed the view that as the matter was being referred to a Full Bench, that Bench should also consider the second question viz., the question of convenience, upon which they were not agreed; a course in which the learned Counsel engaged in the case before the Full Bench have concurred.

The question for the determination of the Full Bench were stated as follows :—

"1. Is the decision in *Rajani Benode Chakravarti* v. *All-India Banking and Insurance Co.* (2) correct?

2. Is the form of the order in *Hiran Kumar Chowdhury* v. *Mangal Sen* (1) correct? If not, what is the correct form of the order?

The further point for consideration is :—

3. Has the accused made a sufficient case for an order under section 185, Criminal Procedure Code, on the ground of convenience?"

The applicant for the Rule is the Managing Agent and a Director of the Bharat Luxmi Provident Company, Limited, carrying on business at its registered head office at 81, Clive Street, Calcutta, and he resides within the locoal limits of the appellate criminal jurisdiction of this High Court.

Proceedings against him and one of the Company's agents were instituted at a place called Karwar in the Canara District of the Presidency of Bombay.

The charges made against the applicant for the Rule are vague and indefinite.

Two charge-sheets have been produced before us written in the Canarese language, and after very considerable trouble, which would have been avoided if proper steps had been taken by those instructing

(1) (1912) 17 C. W. N. 761.
(2) (1913) I. L. R. 41 Calc. 305; 17 C. W. N. 1207.

learned counsel for the prosecution, the official of the Court have succeeded in obtaining a translation.

These show the charges to be as follows :—

"(1) The charge is that the Company effected Life Assurance and granted Marriage Policies stipulating in both cases to pay more than the money invested by the assured, but has failed to do so. Accused stand charged under sections 420 and 409 of the Indian Penal Code."

"(2) Charged with swindling persons effecting insurances without proper return according to the regulations of the Company."

Such statements do not give much, if any, indication of what the real nature of the criminal charges is against the Managing Agent, and indeed taken by themselves the statements might almost be said to amount to allegations of a civil liability against the Company rather than a criminal charge against the applicant personally. The District Superintendent of Police of Canara, however, has forwarded a statement, entitled "Points to refute the statement made by Charu Chandra Mazumdar in his application to the Calcutta High Court."

This statement is almost as vague as the statements in the charge-sheet, but it purports to allege that the Company on false representations and assurances led the public to become subscribers of the Company and to obtain policies, and failed to carry out the promises with the ultimate result that the policies lapsed and the Managing Agent managed the accounts in such a way by withholding proper receipts, that he appropriated the money subscribed by the Policy Holders and "allowed the policies to lapse directly or indirectly" and thereby managed to profit the Company and himself.

With such statements only before us, it is difficult to understand what is the real nature of the charge made against the Managing Agent; the conclusion I come to is, that the prosecution intend to allege some system of fraud against the Company to which the Managing Agent was a party and that they do not know what it will be until they have had an opportunity of investigating the books of the Company.

I am confirmed in this opinion by the fact we were informed that the prosecution have demanded the production of the Company's book for the years 1911 to 1915, and that as regards the Managing Agent, the Magistrate has expressed the opinion "that the case against him seems to depend mostly on documentary evidence."

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(1) As regards the first point viz., jurisdiction—it is not disputed by the learned counsel for the Crown that if it could be shown on the facts that the Court at Karwar had no jurisdiction to try the case against the Managing Agent, this Court would have jurisdiction under section 185, Code of Criminal Procedure, to decide by which Court the alleged offence should be inquired into or tried—and it has also been conceded by him that if on the facts there is a doubt where the offence was committed, this Court could exercise the powers given by section 185. He has argued, however, that on the facts the alleged offence under section 420, Indian Penal Code, must have been committed (if committed at all), partly within the jurisdiction of the Karwar Court, and that as regards the alleged offence under section 409, Indian Penal Code, there may be a doubt whether the Karwar Court has jurisdiction.

He argued, therefore, that as regards the alleged offence under section 420, Indian Penal Code, at all events the Court could not exercise the powers contained in section 185.

In view of the conclusion at which I have arrived upon the question of "convenience," and to which I will refer hereinafter, I do not think it necessary to decide the point whether such a state of affairs as set out above would be sufficient to give the Court jurisdiction under section 185, and in my judgment it would not be desirable in this case to express any opinion thereon, unless it was necessary so to do, having regard to the vagueness and indefiniteness of the charges: the state of uncertainty in which the Court is left both as to the charges and the facts upon which they are alleged to be based make it very difficult to arrive at any definite conclusion without further investigation.

The main point however on which the question of jurisdiction was argued, was that of "convenience."

It was argued on behalf of the applicant that this Court could exercise the powers given by section 185, merely on the ground of "convenience" and "expediency". This was strenuously denied in argument by the learned counsel for the prosecution. This question depends upon the proper construction of section 185.

That section says:—

"(1) Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this chapter be enquired into or tried, the High Court, within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into or tried."

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The words in the section "should under the preceding provisions of this chapter" necessitate a reference to sections 177 to 184, and a consideration of those sections leads me to the conclusion that in some cases, mentioned in those sections, e.g., where jurisdiction is given to more Courts than one for the same offence, if a doubt arises as to the Court by which such offence should be tried, it must involve a doubt as to the suitability of one Court as compared with another from the point of view of "convenience" and "expediency."

I therefore agree with the construction placed upon the section by Chaudhuri, J., and Newbould, J.

This is in accordance with the judgment of Chitty, J., and Richardson, J. in *Hiran Kumar Chowdhury* v. *Mangal Sen* (1), and *The Emperor* v. *Chaichal Sing* (2), a decision of the Chief Court of Lower Burma decided in 1909 and consequently in my judgment the decision in *R. B. Chackravarti* v. *All-India Banking and Insurance Company* (3) was not correct.

(2) I take next the question whether from the point of view of general convenience the case against the Managing Agent should be tried in Calcutta or at Karwar. This is a question by no means free from difficulty as is evidenced by the fact that different views have been taken by Chaudhuri, J. and Newbould, J. I have come to the conclusion, however, that the balance of convenience is in favour of the case being tried in Calcutta, and therefore, with great deference to the opinion expressed by Newbould, J., I really need say no more than that I agree with the conclusion arrived at by Chaudhuri, J.

The learned Judge has set out the main grounds for his conclusion in his judgment, and I need not repeat them.

I will add this, that although it is alleged that a considerable number of witnesses who are Policy-holders will be necessary to prove a "system" on the part of the Company, the evidence of such witnesses must necessarily be of a formal nature and perhaps undisputed, whereas the real crux of the case will depend upon a close investigation of the books of the Company, and upon an enquiry as to how the money subscribed by the Policy-holders has been applied: This will necessitate as we have been told and as I assume, the evidence of expert Accountants on the one side and the other, and this is the part of the case which, in my judgment, will be likely to occupy the greater portion of the time devoted to

(1) (1912) 17 C. W. N. 761. (2) (1909) 9 Cr. L. J. 581.
(3) (1913) I. L. R. 41 Calc. 305.

the enquiry. The prosecution allege that the books for five years will be necessary and the Magistrate, as already mentioned, states that the case will depend mostly on documentary evidence.

If such books and the Managing Agents are to be taken to Karwar and to remain there for weeks and perhaps months, it is possible that this may create a great hardship on the Company, and it is alleged that it will amount virtually to a stoppage of the business of the Company.

I think that this jurisdiction in cases of this kind should be exercised sparingly but with respect to this matter, in my judgment, it is impossible to leave out of consideration the fact that the prosecution have failed to define the real nature of the criminal charges alleged against the Managing Agent, although it must have been obvious that on such an application as this, it was essential that the Court should have as definite information thereon as is possible—a fact which I think may be taken to render this case an exceptional one.

(3) As regards the form of the orders, in my judgment it should follow the words of section 185 and it should be limited to a declaration that the Court's decision is that the case against Charu Chandra Mazumdar should be inquired into or tried by the Court of the Chief Presidency Magistrate in Calcutta. This will leave it open to the prosecution or the applicant to take such steps as they may be advised.

I desire to take this opportunity of expressing our obligation to the Chief Justice and Judges of the Bombay High Court for their courteous assistance to us in this matter.

Woodroffe, J.—The referring judgment holds that this Court has extra-territorial jurisdiction under section 185 and this is not disputed by the Crown and therefore I need not consider the section upon this point.

The question then before us is whether the "doubt" referred to in the section is a doubt as to competency or jurisdiction, or whether it is a "doubt" whether one or another Court should enquire into or try a case on the ground that an accused alleges that it will be inconvenient for him if one of these Courts does so. There is no question but that this matter of convenience is dealt with by the Criminal Procedure Code, as regards Courts within the jurisdiction under section 526, and without the jurisdiction under section 527. We are then asked to say that though the Code provides that the Government may transfer a case which is in a Court outside the jurisdiction on the ground of convenience, section 185 gives a similar

power to the High Court, with this difference that whereas the Government can make an order of transfer this Court cannot, but can only pass a "decision" in the nature of a declaratory order to which comity of Courts will give effect. It is not usual for the Legislature to duplicate procedure in this way and one result of holding that it has done so, will make it possible for this Court under section 185 and the Government under section 527 to pass conflicting orders. Further, as Mr. Camell has shown the course of legislation is against the view that section 185 is intended to cover question of convenience of this kind. For under the Code of 1882 the present section 185 and the sections 526, 527 were placed within the same chapter, whereas now the two latter sections have been removed to another chapter, and the words "under the preceding provisions of this chapter" have been inserted in section 185. Thus to take an instance appropriate to the present case under section 181 (2) criminal breach of trust may be tried by a Court within the local limits of whose jurisdiction any part of the property was received or retained or the offence was committed. There might be a doubt on the facts whether what was done constituted a receiving or retention within a particular jurisdiction or whether the offence was committed in another local area. Under these circumstances the assistance of the Court might be invoked to determine the matter under section 185. But if there is no such doubt and it is clear that property was retained within one jurisdiction, and the offence committed in another, the Court has no power to interfere under section 185, on the ground that it is more convenient to the accused that he should be tried in one jurisdiction and not in another. To hold otherwise would be to cut down the clear provisions of section 181 (2) and to give the Courts of one province power to interfere with action taken in the Courts of another province, upon grounds which may occur in any and every case. This I think was never intended nor that the High Court should determine that one Court is more suitable than another if there is no doubt that there is jurisdiction in either. Section 185 is not designed to cut down admitted jurisdiction, but to determine cases where the facts said to constitute jurisdiction are doubtful. There must also be facts on which a doubt can arise. These provisions deal with jurisdiction and not with convenience. We may speak of a "doubt" whether one Court or another has jurisdiction, but it is straining language to say that there is a "doubt" (not a "question") whether it is convenient to an accused to be tried in one Court or another. The word "should" is possibly ambiguous

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and may apply to the suitability of a particular Court as well as its competency. For the reasons, however, above stated, I think that section 185 does not deal with transfer or decisions on the ground of mere convenience raised by the accused but with doubt as to competency. As the question of convenience can be raised in a very large number of cases, a contrary construction may lead to an obstruction of administration. Where proceedings are started in Bengal applications can be made in Bombay, Madras, Allahabad and elsewhere and *vice versa*. There is nothing to prevent an accused leaving one jurisdiction and going to another to make such an application. If it is not a *bona fide* application it may be rejected, but meanwhile proceedings are delayed and the prosecution obstructed. I am of opinion we cannot under this section consider the question of convenience merely, but if we could, I agree with Mr. Justice Newbould that this is not a case in which we should make an order having the effect of removing the proceedings from Bombay. In a matter of convenience we must consider not only the interests of the accused but also of the prosecution and its witnesses. The return of the Magistrate states the grounds which I think support the view which Mr. Justice Newbould has taken. The complainants are poor illiterate persons and to ask them and their witnesses to travel to Calcutta will, I have little doubt, result, as Mr. Camell says, in the prosecution falling through: though, (without prejudging the case against the accused), there is material on the record to show that it is possible that this is one of the too numerous cases in which persons allege that they have been defrauded by the indigenous provident societies and insurance offices which have sprung up in India in recent years. If we accede to the general contentions urged in this case, the result is likely to be as follows:—Such societies generally have their head office in the larger towns and sometimes, as here, in the capital of another province, than that in which the insurances are effected. In such cases to call upon poor illiterate persons to go to the expense and trouble of travelling far from the place where the offence was committed may amount to a denial of justice. As is well known, the Courts are as a rule averse to issuing commissions in criminal cases and the main point urged by the accused that his books are wanted is met in part by the fact that they will be required wherever the suit is tried, and if it be said that the inconvenience will be less here than in Bombay, the answer is that all that the prosecution require are the entries relating to the Khanapur Agency and of these only copies are required, on which being given the books may be returned.

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I come now to the next contention that apart from the question of convenience a "doubt" arises as to the competency of the Bombay High Court. It is conceded that no such doubt exists as regards the offence under section 420 which the Bombay Courts are empowered to try. It is said however, and this is not denied, that there may be a doubt whether the Bombay Court has jurisdiction to try the offence charged under section 409. It is noteworthy that this point is not mentioned in the referring judgment. If we examine this point closely we find that what is meant to be said is not that there are allegations of fact on which a doubt arises which Court should try the offence, but that the facts alleged are insufficient to show what are the facts which are said to constitute the offence and where they were committed. If this be so, the obvious course is not to ask us for an impossible decision whether the case should be tried here or in Bombay, but to take the necessary proceedings open to the accused in the Bombay Court. The nature of these proceedings would according to Mr. Norton be to quash the charge as regards section 409. His client does not propose to go to the Court which alone can do this, but he wishes to put section 185 to an indirect use and get the proceedings over here and then make an application which, if well founded, should be made now in the Bombay Court.

This is not such a "doubt" as is referred to in the section. How on these facts could we decide that the case under section 409, the facts of which we are ignorant, should be tried in Calcutta or anywhere else. Mr. Norton's real contention is that the case should not be tried anywhere upon the present charge at all.

If however we interpret the prosecution statements as definite enough to show that an offence may have been committed either in Bombay or at Calcutta then we must first consider whether we can pass a decision which shall affect the proceedings under section 420 even though it is conceded no "doubt" arises with reference thereto. There is nothing in the section which authorises us to say that there is no doubt as to one offence but doubt as to another, and as the offences arise on the same facts give a decision which shall affect both charges. Nor assuming we have such a power, is there any necessity to do so? The Bombay Court has clearly jurisdiction as regards section 420 of which it should not be deprived.

It is not clear when or on what materials an application under section 185 should be made, but it is to be noted that the want of definiteness is in part at least due to the fact that specific charges have not been formulated after evidence taken. This evidence may

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disclose either that the Court has jurisdiction to try an offence under section 409 or a charge of abetment of such offence. If so, there is no reason why the Court selected by the prosecution within whose jurisdiction the complainants are, should not try the offence. If the evidence discloses that no offence was committed within the jurisdiction, the accused will be acquitted on that ground. I am satisfied that there is a great probability that as the result of holding otherwise the charges made will not be tried anywhere or at all. And this result and not a trial in any particular one of two Courts (as to which there may be a "doubt") is doubtless, the object of the present application which seeks to put section 185 to an use for which, in my opinion, it was not intended.

I would, accordingly, answer the questions referred to us as follows :—

(1) Yes.

(2) The matter does not arise for decision on my judgment.

(3) Mere convenience either of the accused or prosecution is not a ground for action, under section 185, and if it were, the proceedings in the present case should under the circumstances be left where they now are.

Mookerjee, J.—Two important questions of law arise on this reference ; namely, *first*, is section 185 Criminal Procedure Code restricted to cases instituted in a Court subordinate to the High Court to which the application is made ; and, *secondly*, is section 185 restricted to cases where a doubt arises as to the jurisdiction of the trial Court by reason of some uncertainty regarding the facts or the law applicable to the case : If both these questions are answered in the negative, the point will require consideration, whether the circumstances of the case before us justify an order in favour of the accused, under the first sub-section of section 185, which is in these terms :

"Whenever any doubt arises as to the Court by which any offence *should, under the preceding provisions of this chapter*, be enquired into or tried, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into or tried."

The first of the two questions formulated above relates to the jurisdiction of a High Court to make an order under this section in respect of an enquiry instituted or trial commenced in a Court situated beyond its territorial limits. Upon this matter, there is no divergence of judicial opinion. That the answer should be in the affirmative, was assumed in the cases of *Hiran Kumar v. Mangal*

Sen (1) and *Rajani Benode* v. *All-India Banking and Insurance Co.* (2). The question, however, was expressly raised and decided in the affirmative in the case of *Emperor* v *Chaichal Singh* (3). In the case before us, the point was not taken before the Division Court, and counsel for the Crown has not contended before us that if the case was otherwise within the scope of section 185, that provision was inapplicable by reason of the circumstance that the proceedings are pending in a Court subordinate to another High Court. This admission by counsel for the Crown would not, however, justify the assumption of jurisdiction by this Court, if section 185, upon its true construction, has no application to proceedings in what may be called extra-territorial Courts ; for it is an elementary rule, that jurisdiction cannot be conferred by consent of parties, where there is an entire absence of jurisdiction. We must further bear in mind that on this reference, not merely the question whereupon there is divergence of judicial opinion, but the entire case is, under the rules of Court, before the Full Bench. It is for these reasons incumbent upon us to satisfy ourselves as to the applicability of secsion 185 to a proceeding instituted in a Court subordinate to another High Court, before we consider the case on the merits.

Upon a careful examination of the provisions of section 185, I have arrived at the conclusion that the section is not restricted to proceedings instituted in a Court subordinate to the High Court where the application is made. The section invests that High Court with authority to determine the question, within the local limits of whose appellate criminal jurisdiction the offender actually is. It is plain that such High Court may not be, in a particular case, the High Court superior to either of the Courts competent to try the offence "under the preceding provisions of the Chapter" mentioned. It is not necessary for my present purpose to determine whether the Legislature contemplated the commission of an offence under circumstances which make it triable in either of two Courts subordinate to two different High Courts, followed by an application under section 185 to a third High Court within the territorial limits of the appellate criminal jurisdiction whereof the offender ordinarily resides or is actually present at the time of the application. This, at any rate, is plain from the terms of the section that if the offence is triable by any one of two or more Courts subordinate to different High Courts, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, is competent to

(1) (1912) 17 C. W. N. 761.
(2) (1913) 17 C. W. N. 1207 ; I. L. R. 41 Calc. 305.
(3) (1909) 9 Cr. L. J. 581.

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entertain the application. I do not feel pressed by the fact that section 527, Criminal Procedure Code, authorises the Governor-General in Council to direct the transfer of any criminal case from any criminal Court subordinate to one High Court to any other criminal Court of equal or superior jurisdiction subordinate to another High Court. The scopes of sections 185 and 527 are obviously different. Under the former section, the High Court, within the limits of whose appellate criminal jurisdiction the offender actually is, merely decides by which Court the offence shall be enquired into or tried. The order made is not in terms an order for transfer, though, no doubt, the resultant effect may be the same, as it is extremely improbable that one High Court should disregard such a determination by another High Court. Section 527, on the other hand, invests the Governor-General in Council with power to make an actual order for transfer. In my opinion, section 185 is comprehensive enough to be applicable to cases instituted in Courts beyond the local limits of the appellate criminal jurisdiction of the High Court where the offender actually is. The first question formulated above must consequently be answered in the negative.

The second of the two questions formulated at the outset, relates to the true scope of section 185 where it is applicable. Upon this matter, there is a divergence of judicial opinion in this Court, which has rendered necessary this Reference to a Full Bench. In *Hiran Kumar* v. *Mangal Sen* (1), Chitty and Richardson JJ. adopted the view that where an offence is triable in either of two Courts, the High Court may make an order under section 185 on the ground that the offence may be enquired into or tried more conveniently in one of those Courts than in the other. On the other hand, in *Rajani Benode* v. *All-India Banking and Insurance Coy.* (2), Imam and Chapman JJ. put a restricted interpretation on the section, and treated it as limited in application only to cases where a doubt arises as to the jurisdiction of the Court by which the offence may be inquired into or tried. Chaudhuri and Newbould JJ. have expressed themselves in favour of the more liberal construction of the section. Upon a minute scrutiny of the relevant provisions of Chapter XV of the Code of Criminal Procedure, I feel convinced that a narrow construction should not be placed upon section 185. This chapter comprises sections 177—199 and is divided into two parts, the first whereof is headed—"Place of Inquiry Or Trial" and includes sections 177—189. Section 177 formulates

(1) (1912) 17 C. W. N. 761. (2) (1913) 17 C. W. N. 1207; I. L. R. 41 Calc. 305.

the general principle that the ordinary place of enquiry and trial is the Court within the local limits of whose jurisdiction the offence is committed. Section 178 authorises the Local Government to order cases to be tried in different sessions divisions. Sections 179—184 embody provisions in the nature of exceptions or alternatives to section 177. Section 179 recognises the doctrine that the accused is triable either in the district where the criminal act is done or in the district where the consequence thereof ensues. Section 180 provides that where the act is offence by reason of relation to another offence, the trial may take place in either of the Courts competent to try the accused for either of the offences. Section 181 deals with four classes of cases. The first class refers to things and dacoits who are liable to be tried by a Court within the local limits of whose jurisdiction the person charged is. The second class includes criminal misappropriation and criminal breach of trust; in the cases of these offences, the offender can be tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person. The third class refers to stealing, and here the offender is made liable to be tried by a Court within the local limit of whose jurisdiction the property was stolen or was possessed by the thief or by a receiver of stolen property. The fourth class comprises kidnapping and abduction; here the offence may be enquired into or tried by the Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained. Section 182 again refers to four classes of cases; namely first, where there is an uncertainty in respect of the local area where the offence is committed; secondly, where the offence has been committed partly in one local area and partly in another; thirdly, where the offence is continuously committed in more than one local area; and fourthly, where the offence committed, consists of acts done in different local areas; in each of these cases, the offence is made triable by a Court having jurisdiction over any of such local areas. Section 183 treats of an offence committed by a person in the course of performing a journey or voyage, and makes the offender liable to be tried by a Court through the local limits of whose jurisdiction the offender or the person against whom or the thing in respect of which the offence has been committed passed in the course of the journey or voyage. Section 184 makes an offence against Railways, Telegraph, Post Office and Arms Act triable in a Presidency town, where such offence may or may not have been

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committed, provided the offender and all the witnesses necessary for his prosecution are to be found within such town. The group of sections, just analysed, is followed by section 185, with which we are primarily concerned. That section relates to cases where any doubt arises as to the Court by which any offence *should*, "*under the preceding provisions of this Chapter*," be enquired into or tried. Full effect must plainly be given to the expressions 'should' and "under the preceding provisions of this Chapter." The contention on behalf of the Crown is that the "doubt" mentioned is a doubt as to the jurisdiction of the Court by which the offence may be enquired into or tried; but this narrow construction would clearly make section 185 inapplicable to all cases comprised in the previous sections, except the particular case contemplated in the first clause of section 182, which speaks of uncertainty with regard to the local area where an offence has been committed. In the events mentioned in the other sections as also in the remaining clauses of section 182, no question can arise as to the competency of the particular Court to hold an enquiry or trial for the alleged offence. In very many instances, for example, in the classes of offences comprised in section 181 or section 184 the only possible question which can arise, on an application under section 185, is that of expediency or convenience; under the rules laid down, the enquiry or trial may be held in one of two or several Courts; the problem for solution is, where *should* the trial actually take place. Indeed, if all cases, where an order is sought under section 185 on the ground of convenience, were excluded from its scope, the reference therein to "the preceding provisions of the Chapter" would become, in a very large measure, entirely nugatory. I am confirmed in my conclusion by the fact that the Legislature uses the term '*should*.' I am not prepared to accede to the contention of the counsel for the Crown that 'should' here is equivalent to 'could.' I do feel reluctant to impute to the Legislature an ignorance of the meaning of this familiar word; on the other hand, I take 'should be tried' in its ordinary sense as equivalent to 'ought to be tried' for 'should' clearly implies a choice between two or more available alternatives. In fact, there would have been no room for controversy if the Legislature had used the term "question" instead of the word "doubt." I am not impressed by the argument that if section 185 was intended to have such a wide scope as is contended on behalf of the accused, it would have been framed in the same terms as section 527 which authorises a transfer by the Governor-General in Council on the ground of convenience,

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The two sections have entirely different scopes. In the first place, the order under section 527 is an executive order which may be made without opportunity afforded to the accused to be heard. In the second place section 527 contemplates an order for transfer and recourse may possibly be had thereto if an order made by one High Court under section 185 is disregarded by another High Court. I hold accordingly that the view taken in the cases of *Hiran Kumar* v. *Mangal Sen* (1) and *Emperor* v. *Chaichal Singh* (2) gave effect to the true intention of the Legislature, though in the former of these cases, the order was not made in strict conformity with the terms of section 185; and I am constrained to dissent from the decision in *Rajani Binode* v. *All India Banking and Insurance Co.* (3). The second question formulated by me must, like the first, be answered in the negative. In this view, it is unnecessary for me to consider whether even if the narrower construction were adopted, the present case would, in so far as the accused is charged with an offence under section, 409, Indian Penal Code, fall within the purview of section 185, by reason of a conflict of judicial opinion regarding the true construction of section 179 and the consequent doubt as to the jurisdiction of the trial Court.

The question finally arises, whether, in the circumstances of the present case, an order under section 185 should be made in favour of the accused. Upon a full consideration of the facts, which have been reviewed in detail by the learned Chief Justice in the judgment he has just delivered, and which I cannot usefully supplement, I see no escape from the conclusion that the balance of convenience is, on the whole, in favour of a trial here. In my judgment, the Rule should be made absolute and an order made in terms of section 185.

Chaudhuri, J.—My answers are to be found in the order of reference. I have nothing to add to what I have said. The reasons why I think that the case should be tried in Calcutta are to be found in my separate judgment which is to be considered as part of my judgment in this reference.

Newbould, J.—I wish to add some remarks to the joint judgment of reference to make my individual opinion more clear. Though I hold we have power to pass orders under section 185, Criminal Procedure Code, on the application of the accused petitioner, I do not think it was intended that the section should be used

(1) (1912) 17 C. W. N. 761. (2) (1909) 9 Cr. L. J. 581.
(3) (1913) 17 C. W. N. 1207.

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for this purpose. It seems to me that the Legislature by giving jurisdiction to several Courts in the previous sections of Chapter XV intended, as far as possible, to remove doubts as to jurisdiction in cases in which such doubt might otherwise arise. There was no necessity to add section 185 to remove doubts as to jurisdiction. Even if doubts did arise as to the interpretation of these previous sections they could be dealt with in the same way as doubts as to jurisdiction which frequently occur in connection with other parts of the Code. But when more Courts than one had been given jurisdiction to try the same offence it became necessary to provide for a possible deadlock which would occur if two Courts either each refused to take action on the ground that the case should be tried by the other Court or both proceeded to try the same case. It seems to me clear this section was enacted to provide for such a difficulty and the doubt mentioned in the section is not a doubt as to jurisdiction but a doubt as to which Court having jurisdiction should try the case under such circumstances. On such a doubt arising the High Court exercising powers under section 185 would have to decide with reference to the convenience of all concerned. Though it was not intended that this section should enable an accused to apply for a transfer on the ground of his personal convenience the wording of the section is sufficiently wide to give a High Court power to take action on such an application. I entirely agree with the remarks of Mr. Justice Woodroffe as to the danger of an obstruction to administration that could be caused by an improper use of this section. To avoid this danger I think that these powers should seldom be exercised on the application of an accused and only if he be able to convince the Court that a refusal to exercise these powers is likely to lead to a miscarriage of justice. This, for reasons, I have given in my previous judgment I hold the present petitioner has failed to do.

I accordingly agree with my Lord the Chief Justice as to the answer to be given to the first two questions referred and adhere to my original opinion that the third question should be answered in the negative and the Rule discharged.

On the 5th December, the following order was passed:

December, 5.

Sanderson, C. J.—In consequence of the opinion of the majority, the Rule is made absolute and the order will be drawn up in terms of section 185 of the Criminal Procedure Code, as indicated in the judgment.

A. T. M.; C. C. B. *Rule made absolute.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice and Sir Asutosh Mookerjee, Knight Judge.

BUDHU LAL

v.

CHATTU GOPE.*

CIVIL.
1916.
November, 16, 27.

Criminal Procedure Code (Act V of 1898), Sec. 195 (6)—Sanction to prosecute—Small Cause Court Judge, application to—Sanction, refusal of—Statement made on oath in the course of a proceeding for leave to sue, if made in course of judicial proceeding—Application against the order of refusal of sanction, if to be made to Judge on the Original side of High Court—Letters Patent, Cl. 15—'Criminal trial'—'Judgment'—Remand order, if valid—Order to be passed by higher tribunal under Sec. 195 (6)—Procedure—Inherent power.

The appellant instituted (it was alleged on behalf of another person) seven suits in the Small Cause Court against the respondent Chattu Gope and others. The case against Chattu Gope being based on a promissory note alleged to have been given in respect of money advanced by the plaintiff at the request of a third person and to have been executed by Chattu Gope in Calcutta. Chattu Gope and the other defendants in those suits being resident outside Calcutta, the plaintiff (appellant) made applications for leave to sue, and swore that the money was lent in Calcutta and payable in Calcutta. When the cases came on for trial, neither the plaintiff nor the alleged other person gave any evidence themselves or produced any witnesses, but agreed to abide by the defendants' denial on oath of their liability. The suit was dismissed. An application was subsequently made on behalf of the defendant Chattu Gope for sanction to prosecute the plaintiff under section 195 of the Criminal Procedure Code for offences punishable under sections 193 and 209 of the Indian Penal Code. The Small Cause Court Judge dismissed the application for sanction, principally on the ground that no offence had been committed, because a statement made on oath in the course of a proceeding for leave to sue was not a statement made in a judicial proceeding. The defendant thereupon applied to Chaudhuri J, sitting on the Original side of the High Court, under section 195 (6) for reversal of this order of the Small Cause Court Judge. The learned Judge held that a statement made on oath in the course of a proceeding for leave to sue was made in the course of a judicial proceeding and directed the Small Cause Court Judge to hold an enquiry and to pass such orders as might seem fit and proper in the result thereof:

Held, that an appeal lay against the order of the learned Judge: That the order fell within the scope of section 195 (6) of the Criminal Procedure Code, and although of a criminal nature, was not a 'criminal trial' within the meaning of Cl. 15 of the Letters Patent: That the order was a judgment within the meaning of that clause.

* Appeal from Original Order No. 12 of 1916, against the order of Mr. Justice Chaudhuri sitting on the original side, dated the 6th December, 1915.

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The definition given of 'judgment' by Sir Richard Couch in *The Justice of the Peace for Calcutta* v. *The Oriental Gas Company (Limited)* (1), while it formulates a useful test, is not a statutory test and cannot be deemed inflexible and exhaustive.

In every case where the Court in called upon to decide whether the decision under appeal is or is not a 'judgment' within the meaning of clause 15 of the Letters Patent, regard must be had to the nature of the contents of the order.

That the statement made on oath in the course of a proceeding for leave to sue, was made in the course of a judicial proceeding.

That the learned Judge had no power to remand the case to the Court of Small Causes for further enquiry. The only order he could pass was either to grant or refuse sanction.

That the petition was directed to be heard by Judges appointed by the Chief Justice.

Sanderson C. J.: The ordinary rule is that the High Court will not interfere and exercise its powers under section 115 of the Civil Procedure Code, if the aggrieved party has other remedy available, though it may do so in exceptional cases.

Per Mookerjee J: Section 195 of the Code of Criminal Procedure creates a special jurisdiction and provides in clause 6 the machinery for the correction of possible errors committed by the primary Court. Consequently, the interference by the High Court is to be attributed neither to section 115 of the Code of Civil Procedure nor to sections 435 and 439 of the Code of Criminal Procedure but only to section 195 (6) of the Criminal Procedure Code.

Ramdhin v. *Sewbalak* (2) not followed.

The remedy provided in section 195 (6) of the Criminal Procedure Code is not restricted in scope, the superior tribunal is not limited to an examination of questions of fact or questions of law alone, but may, upon a review of all the circumstances, either affirm or reverse the order of the primary Court. It is thus immaterial, whether the remedy provided in clause 6 of section 195 is regarded as in the nature of an appeal or a revision.

Ram Raja v. *Sheo Dayal* (3) and *Jamna Doss* v. *Sabapathy* (4) referred to.

That the learned Judge of the High Court had no jurisdiction to deal with the matter. That when the application was to be heard by such Judge or Judges, as the Chief Justice appoints, it would be competent to the Court to hold an enquiry into the facts, and for this purpose to act on evidence adduced before it or before the subordinate Court under its direction.

Rama Iyer v. *Venkatachella* (5) not followed. *Rahamatullah* v. *Emperor* (6) followed.

The Court has inherent power to take such steps as may be necessary to enable it to discharge the duty imposed upon it. This inherent power is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised

(1) (1872) 8 B. L. R. 433.
(2) (1910) I. L. R. 37 Calc. 714.
(3) (1915) I. L. R. 37 All. 439.
(4) (1911) I. L. R. 36 Mad. 138.
(5) (1907) I. L. R. 30 Mad. 311.
(6) (1915) 17 Cr. L. J. 29; 7 Cr. L. R. 402.

ex debito justitiae, to do that real and substantial justice for the administration of which alone Courts exist; but the Court in the exercise of such inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intention of the Legislature as indicated in statutory provisions.

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Appeal by the Plaintiff.

The material facts are stated in the judgment of

Chaudhuri, J:—In these matters, I issued Rules on the plaintiffs in the above suits to shew cause why the order refusing sanction to prosecute them should not be set aside, or why an enquiry should not be directed in order to grant such sanction. The application was headed "In the matter of section 115 of the Code of Civil Procedure," but when it was made it appeared to me to be more appropriate to head it under the Criminal Procedure Code, and in fact the learned Standing Counsel treated it as such an application. It has been argued that it does not come under section 115 Civil Procedure Code, at all. This is not necessary to consider. Under section 195, Criminal Procedure Code, this Court is the superior Court of the Presidency Small Cause Court, and has power to deal with the order which was made by that Court This has not been seriously contested by learned counsel who appeared for the plaintiffs. Formal amendment of the heading will, if necessary, be made. So far as the verification of the application before me is concerned, it is undoubtedly faulty; but inasmuch as I think that this is a fit case for an enquiry before sanction is granted, I do not think that such faulty verification much matters. The learned Judge who dealt with the application in the Small Cause Court appears to me not to have taken a correct view of the nature of an application for leave to sue. He has held that such an application is not a stage in a judicial proceeding. It seems to me that it is, where such leave is necessary to give the Court jurisdiction. Rule 87 of the Small Cause Court requires an application for leave to sue, to be verified as a plaint. It requires the party making such an application to be present with such evidence as may be required by the Court in support of the applicant's allegations. The practice in the Small Cause Court has apparently been to take the oath of the party when he makes such an application. There is ample jurisdiction in the Court to administer an oath at that stage, and such oath, when administered, is an oath taken in the course of a judicial proceeding. I do not think it necessary in the view I take to deal with the cases which have been cited on this point. Learned counsel, Mr. Norton, has rightly contended there has been considerable delay in this matter. The delay has been explained in the affidavits before me. No doubt

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there was no explanation of the delay before the learned Judge, before whom the application was originally made; and although Mr. Pearson who appeared for the plaintiffs asked for such explanation, no explanation was given. It has however been given now. It would undoubtedly have been better if such explanation had been then given; but there is no reason to doubt the facts which have now been placed before me. There has been delay. In the circumstances, some of it was unavoidable especially, as communications had to be made to the Behar Government. The delay in this matter is not such as to lead me to think that there is any likelihood of the plaintiffs being prejudiced. The prosecution has been taken up by the Crown. I direct that an enquiry be held by the learned Judge as to whether sanction should be given upon the materials placed before the Court. The Oaths Act, under which the suits were dismissed, has nothing to do with the matter. The merits of the cases were not decided as upon a trial, but the result of the special oath was the dismissal of the suits. But the grounds upon which the jurisdiction of the Court was invoked when leave was asked for to institute the suits are alleged to be false. Whether such grounds are true or untrue, are to be enquired into. I think these are fit cases for such an enquiry. If upon such enquiry it be found that the allegations were false and leave to sue was improperly obtained, sanction should be given to the Crown to prosecute the persons concerned. I make the Rules absolute. The matters being in the nature of criminal proceedings, I do not direct any costs.

Against this order, the plaintiff appealed under clause 15 of the Letters Patent.

Mr. K. N. Chowdhury for the Appellant.

Mr. B. C. Mitter for the Respondent.

On a preliminary objection being raised by the Counsel for the respondent as to the competency of appeal, the following judgments were delivered:

November, 16.

Sanderson, C. J.—In this case the learned Standing Counsel has taken a preliminary point that there is no right of appeal.

The position is as follows: An application was made in the Small Cause Court of Calcutta on behalf of the defendant, for sanction to prosecute the plaintiff, under section 209, Indian Penal Code, for having fraudulently and dishonestly and with intent to injure and annoy the defendant made a claim at it he knew to be false and also under section 193, Indian Penal Code, for having in an application for leave to institute a suit knowing and intentionally made a false statement when legally bound to state the truth. One of the learned Judges of the Small Cause Court refused

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the sanction basing his judgment upon two grounds. The first was that the statements were not made in the course of a judicial proceeding, and the second was that there had been undue and unreasonable delay in making the application. The statement referred to was made upon affirmation upon an application for leave to sue people who were outside the jurisdiction of the Small Cause Court. The application having been refused, a further *application*—I advisedly use this word and do not use the word appeal—was made to Mr. Justice Chaudhuri alleging that the decision of the learned Judge of the Small Cause Court was wrong, and that sanction ought to have been granted. The learned Judge came to the conclusion that the statement had been made in the course of a judicial proceeding, and that the delay had been explained away: and, he made an order that the matter should be further investigated by the learned Judge of the Small Cause Court and that that Judge should determine, upon the materials placed before the Court and having regard to Mr. Justice Chaudhuri's decision, whether or not sanction should be granted. Against that decision the plaintiff Budhu Lal has appealed. Thereupon, as I have already stated, the learned standing counsel took a preliminary objection that there was no appeal, on the ground that the order made by Mr. Justice Chaudhuri was not a *judgment* within the meaning of clause 15 of the Letters Patent. I do not think that I need dwell at length upon one point to which reference was made by the learned standing counsel, because he did not really to my mind seriously urge it. I do not think it can be said that this was an order made in a Criminal trial within the meaning of the words in clause 15. The point that the learned standing counsel earnestly argued is that it is not a *judgment* within the meaning of that clause.

Now, the definition of the word *judgment* relied upon is that contained in the learned Chief Justice Couch's judgment in the well-known case of *The Justice of the Peace for Calcutta* v. *The Oriental Gas Company* (1). The passage (which is at page 452) is this: "We think that "Judgment" in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." Now, there have been numerous cases dealing with this point, and I think I am right in

(1) (1872) 8 B. L. R., 433.

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saying that the definition given by the learned Chief Justice has never been regarded as absolutely exhaustive, and whenever this point is taken, the Court has to make up its mind whether the particular order in question is a *judgment* within the meaning of clause 15, having regard to the nature of the order. In my judgment the order which was made in this case by the learned Judge is a *judgment* within the meaning of clause 15. Therefore, there is a right of appeal.

Let me state quite shortly how the matter appears to my mind: Two points were taken before the learned Judge. The first of them was that the statements relied upon were made in the course of a judicial proceeding. The second was that although there had been delay, that delay could be and was explained away.

As regards the second point the learned Judge thought that there was an explanation of the delay.

As regards the first point, he came to the conclusion and decided that the statements were made in the course of a judicial proceeding. Now, was not that a question which was between the parties? Certainly it was. The plaintiff was alleging on the one hand that the statements were not made in the course of a judicial proceeding: The prosecution on the other hand was alleging that they were made in the course of a judicial proceeding. It may be said that this was the main question between the parties. If the learned Judge had come to the conclusion that the statements were not made in the course of a judicial proceeding, that would have put an end to the matter, and the application would be dismissed. This case therefore comes within the exact words of the learned Chief Justice Couch when he said "It means a decision which affects the merits of the question between the parties by determining some right or liability."

Of the other cases which have been referred to, one is *Ebrahim v. Fuckhrunnissa Bibi* (1), which is a decision of Chief Justice Garth. He says, "I think that the word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character which merely decides some isolated point, not affecting the merits or result of the entire suit." As I have pointed out, the decision of the question as to whether the statements were made in the course of a judicial proceeding, was one which affected the merits or results of the entire matter for, if it

(1) (1878) I. L. R. 4 Calc. 531.

had been decided in one way, viz, in favour of the applicants' contention it would have put an end to the proceeding altogether.

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For these reasons I think that the order appealed against is a judgment within the meaning of clause 15 of the Letters Patent, and that there is a right of appeal.

Mookerjee, J.—I agree that the appeal is competent and that the preliminary objection must be overruled.

The appeal is directed against an order of Chaudhuri, J. which purports to have been made under clause (6) of section 195, Criminal Procedure Code. The appellant instituted a suit against the respondent in the Court of Small Causes at Calcutta. The defendant entered appearance; but at the trial the plaintiff made no attempt to prove his claim, with the result that the suit was dismissed. An application was subsequently made on behalf of the defendant for sanction to prosecute the plaintiff under section 195, Criminal Procedure Code, for offences punishable under sections 193 and 209, Indian Penal Code. The Small Cause Court Judge dismissed the application for sanction, principally on the ground that no offence had been committed, because a statement made on oath in the course of a proceeding for leave to sue is not a statement made in a judicial proceeding. The defendant thereupon applied to Chaudhuri J. under section 195 (6) for reversal of this order of the Small Cause Court Judge. Chaudhuri J. came to the conclusion that the statement mentioned must be deemed to have been made in the course of a judicial proceeding and that consequently the order of the Small Cause Court could not be sustained. He did not, however, forthwith grant sanction to prosecute the plaintiff under section 195, but directed the Small Cause Court Judge to hold an enquiry and to pass such orders as might seem fit and proper, on the result thereof. The appeal is directed against this order.

The contention of the respondent is that the decision of Chaudhuri J. is not a *judgment* within the meaning of clause 15 of the Letters Patent. That clause, in so far as it is material for the purposes of the present case, provides that "an appeal shall lie to the High Court from a judgment, not being a sentence or order passed or made in any criminal trial, of one Judge of the said High Court." It is obvious that the order in question cannot in any sense be described as a sentence passed or order made in any criminal trial by one Judge of this Court. The proceeding before Chaudhuri J. fell within the scope of section 195 (6) and although

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of a criminal nature [*In re An Attorney* (1)] was plainly not "a criminal *trial*": *Chakrapani* v. *King-Emperor* (2). The question, accordingly, arises, whether the decision was a judgment.

Reference has been made to the definition given by Sir Richard Couch C. J. in the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (*Ld.*) (3). "Judgment in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory. The difference between them is that a final judgment determines the whole case or suit and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." According to this definition, the circumstance that the order directs an enquiry and is consequently of a preliminary or interlocutory character, does not show that it is not a *judgment*. The true question in controversy thus is, whether the decision affects the merits of the question between the parties by determining some right or liability. Now, the appellant is liable to be prosecuted only after sanction has been granted under section 195, Criminal Procedure Code, for offences within the scope of sections 193 and 209, Indian Penal Code, if the statement imputed to him may rightly be held to have been made in the course of a judicial proceeding. The Small Cause Court Judge took a view favourable to him; Chaudhuri J. has expressed a contrary opinion. It is clear to my mind that in these circumstances the decision does affect the merits of the question between the parties by determining liability. It is not necessary for our present purpose to refer to the numerous judicial decisions which embody an attempt to define or elucidate the meaning of the term judgment as used in clause 15 of the Letters Patent, and which were analysed by me in the case of *Mathura Sundari Dasi* v. *Haran Chandra Saha* (4); but I desire to emphasise this point that the definition given by Sir Richard Couch while it furnishes a useful test, is not a statutory definition and cannot be deemed inflexible and exhaustive. In every case where the Court is called upon to decide whether the decision under appeal is or is not a *judgment* within the meaning of clause 15 of the Letters Patent, regard must be had to the nature and the contents of the order. It may not be easy to reconcile all the reported decisions, on their special facts, or to draw a dividing line between different classes of cases, such as

(1) (1912) I. L. R. 41 Calc. 446.
(2) (1902) 1 Weir 787; 12 M. L. J. 408. (3) (1872) 8 B. L. R. 433.
(4) (1915) C. L. J. 443; I. L. R. 43 Calc. 857.

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Hadjee Ismail v. *Hadjee Mahomed* (1), and *Ebrahim* v. *Fuckhrunnissa* (2). But the present case, is reasonably free from difficulty and I entertain no doubt that the appeal is competent. Cf. *Rama* v. *Venkatachella* (3).

[After over-ruling the preliminary objection, the Court passed judgment on the merits].

Sanderson, C. J.—This is an appeal from the decision of Chaudhuri J. given on the 6th October, 1915, whereby he directed that an enquiry should be held by one of the learned Judges of the Small Cause Court as to whether sanction should be given to prosecute one Budhu Lal, the plaintiff in the Small Cause Court suit and the appellant in this Court upon the materials placed before that Court, and whether the grounds upon which the jurisdiction of the Court was invoked when leave was asked for to institute the said suit No. 15,292 of 1913, are true or untrue.

We have already disposed of the preliminary point taken by the learned standing counsel and held that an appeal lay from the decision of Chaudhuri J.

We have now to decide the appeal on the merits.

I have already sufficiently stated the facts in giving judgment on the preliminary point, and I need not repeat them. The first point which arises is, whether the learned Judge had jurisdiction to make the order in the form to which I have already referred.

The application was headed "In the matter of section 115 of the Code of Civil Procedure," but the learned Judge at the hearing suggested that it would be more appropriate if it were made under the Criminal Procedure Code, and in fact the learned Standing Counsel treated it as such an applictaion and the learned Judge purported to make the order under section 195 of the Criminal Procedure Code.

The Small Cause Court being subordinate to this Court, it is clear that this Court had jurisdiction under section 195 (6) of the Criminal Procedure Code to deal with the application; but in my judgment it is equally clear that under this section there was no power in the learned Judge to remand the case to the Small Cause Court for further enquiry. Under this section the sole power given to this Court is to revoke a sanction given or grant a sanction refused by the subordinate Court, and therefore, in my judgment, the order, made in the form already referred to, which amounted to a remand

(1) (1874) 13 B. L. R. 91.
(2) (1878) I. L. R. 4 Calc. 531; 3 C. L. R. 311.
(3) (1907) I. L. R. 30 Mad. 311.

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for further enquiry and decision by the Small Cause Court, cannot be upheld. This was not really disputed by the learned Standing Counsel, but he urged that such an order could be supported by reference to section 115 of the Civil Procedure Code. As regards this point, it must be remembered that the proposal of the learned Judge to deal with this application under section 195 of the Criminal Procedure Code was adopted on behalf of the applicant, and, in my judgment, it would not be right for us in a case of this kind, which is of a criminal nature, to allow the applicant, who is really the C. I. D., to shift his ground again even if we had power to act under section 115 of the Civil Procedure Code.

The ordinary rule of this Court is that it will not interfere and exercise its powers under section 115 of the Civil Procedure Code if the aggrieved party has other remedy available, though it may do so in exceptional cases.

There being the remedy provided by section 195 of the Criminal Procedure Code, I do not think it would be right for us under the circumstances of this case, even if we have jurisdiction so to do, to exercise the powers given to the Court under section 115 of the Civil Procedure Code.

It must, therefore, be considered what order should be made in this case.

It has been decided by Chaudhuri J. that the learned Judge of the Small Cause Court was wrong in holding that the application for leave to sue was not a stage in a judicial proceeding, and I concur in Chaudhuri J's judgment. He held further that the delay in making the application had been explained to his satisfaction: I see no reason to differ from his decision on this question of fact.

The circumstances of the case were certainly remarkable, so far as the facts, which we have before us, indicate.

The plaintiff instituted (it is said on behalf of another person) 7 suits in the Small Cause Court against Chattu Gope (the petitioner before Chaudhuri J.) and others: the case against Chattu Gope being based on a promissory note alleged to have been given in respect of money advanced by the plaintiff at the request of a third person and to have been executed by Chattu Gope in Calcutta in September, 1911. Chattu Gope and the other defendants in these suits being resident outside Calcutta, the plaintiff Budhu Lal made applications for leave to sue, and swore that the money was lent in Calcutta and payable in Calcutta. When the cases came on for trial, neither the plaintiff nor the alleged other person gave any evidence themselves or produced any witnesses, but agreed to abide

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by the defendants' denial on oath of their liability. No decision has been given on the merits of the application for leave to prosecute, and under the circumstances of the case, in my judgment, it is desirable that such a decision should be arrived at by this Court; and the proper course will be to remit the application to a Division Bench, and as Chief Justice I determine, as I have power to do, that the case shall be remitted to Teunon and Chaudhuri JJ. By this course I hope further delay will be prevented. The question remains whether on the hearing the application will be confined to the materials which were before the Small Cause Court, or whether the Court will have power to take evidence. I should be sorry to be compelled to hold that the Court had no power to take evidence on such an application as this. If I was compelled so to hold, unfortunate results might happen: it might happen that the Judge of a subordinate Court might decide to refuse sanction to prosecute on a point of law without giving the accused person an opportunity of being heard on the merits. Upon an application under section 195 of the Criminal Procedure Code the High Court might decide (as it did in this case) that the judgment of the subordinate Court on the point of law was wrong: and the Court would then have to decide whether sanction to prosecute should be granted. In such a case it would be a great hardship on the accused person if he were debarred from giving his explanation before the High Court, especially as the Judge of that Court under section 195 could not remand the case for further enquiry and decision.

In my judgment the learned Judges can take evidence as to the merits of the application. In fact, evidence, in the shape of affidavits, has already been given before Chaudhuri J., and the affidavits are on the file available for the use of the Court—it will be open to the Court to consider such evidence and to take further evidence if it thinks fit, due care of course being taken, if any examination of witnesses takes place, that the person against whom the charge is made is not put into a position of prejudice, or called upon in any way to incriminate himself.

Mookerjee, J.—I agree that the order made by Chaudhuri, J. cannot be supported.

The Small Cause Court Judge dismissed the application for sanction to prosecute the appellant under section 195, Criminal Procedure Code, on the ground that the alleged offence had not been committed in relation to any proceeding in any Court. The applicant for sanction then brought up the matter to this Court under section 195 (6) read with section 195 (7) (*c*). Chaudhuri, J.

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has held,—and in my opinion correctly held—that the ground assigned by the Small Cause Court Judge in support of his order is erroneous; he has accordingly discharged that order and remanded the case for enquiry and final disposal by the Small Cause Court Judge. It has been argued before us that the order of remand for fresh investigation is erroneous as not contemplated by section 195 (6). That clause provides that any sanction given or refused under the section may be revoked or granted by any authority to which the authority giving or refusing it, is subordinate. Where, as in the case before us, the subordinate Court has refused sanction, the superior Court is, upon a plain reading of section 195 (6), authorised either to cofirm that order or to grant sanction; but the superior Court is not authorised to remand the case for further enquiry and for final disposal in accordance with the result thereof. This position cannot be and has not been contested; it is, indeed, supported by several judicial decisions: *Anonymous* (1); *Beni Prasad* v. *Sarju Prasad* (2); *In re Kamma Narayana* (3); *Mohammad* v. *Muqimuddin* (4). But the Standing Counsel has contended that when a subordinate civil Court has made an order under section 195, the High Court is competent to interfere, not merely under clause (6) of that section, but also in the exercise of its revisional powers under section 115 of the Civil Procedure Code and to pass, under this latter section, such order as it may deem proper. In support of this view, reliance has been placed upon the decision of Pugh, J. in *Ramadhin* v. *Sewbalak* (5), which is based upon the view taken by the Allahabad High Court in *In the matter of Bhup Kunwar* (6) and *Salig Ram* v. *Ramjilal* (7). There has been considerable divergence of judicial opinion upon the question, whether, when a High Court revises an order of a subordinate civil Court made under section 195, Criminal Procedure Code, the source of the authority for such interference should be sought in section 115 of the Civil Procedure Code or in section 439 of the Criminal Procedure Code. The cases of *Ram Prosad* v. *Sooba Roy* (8); *Guru Churn* v. *Girija Sundari* (9); *In re Chennanagoud* (10); *Muhammad* v. *Muhammad* (11); *Salig Ram* v. *Ramjilal* (7);

(1) (1906) 16 M. L. J. 45 (S. N).
(2) (1911) I. L. R. 33 All. 512.
(3) (1910) 9 Mad. L. T. 97; 11 Cr. L. J. 699.
(4) (1913) P. R. 7; 14 Cr. L. J. 178.
(5) (1910) I. L. R. 37 Calc. 714.
(6) (1903) I. L. R. 26 All. 249.
(7) (1906) I. L. R. 28 All. 554.
(8) (1897) 1 C. W. N. 400.
(9) (1902) 7 C. W. N. 112.
(10) (1902) I. L. R. 26 Mad. 139.
(11) (1903) 23 All. W. N. 172.

Kannambath v. *Manathanath* (1); *Kali Prosad* v. *Bhuban Mohini* (2); *Mahomed* v. *Queen-Empress* (3); *Ranjit* v. *Shabbamal* (4); *In re Tilak* (5); *Emperor* v. *Bankatram* (6); directly or impliedly support the view that section 115, Civil Procedure Code, is applicable. On the other hand, the decisions in *Bisan* v. *Amrit* (7); *Emperor* v. *Barkat Ram* (8); *Sankar Rao* v. *Shaik Daud* (9); *Musaji* v. *Muhammad Wallayatullah* (10); *Venkata Rama* v. *Achayya* (11); favour the view that it is competent for the High Court to revise the order of the subordinate civil Court in such circumstances only under sections 435 and 439 of the Criminal Procedure Code. In my opinion, this controversy as to the rival claims of section 115 of the Civil Procedure Code and sections 435 and 439 of the Criminal Procedure Code is based upon a misapprehension and the fallacy which underlies the decision of Pugh, J. in *Ramadhin* v. *Sewbalak* (12) is the erroneous assumption that one of these sections must be applicable. The true view is that section 195 creates a special jurisdiction, as explained in *Audimulam* v. *Krishnayen* (13), and provides in clause (6) the machinery for the correction of possible errors committed by the primary Court. Consequently, upon well-known principles, the interference by the High Court must be attributed, neither to section 115, Civil Procedure Code, nor to sections 435 and 439 Criminal Procedure Code, but only to section 195 (6) Criminal Procedure Code. As Lopes, L. J. observed in *R.* v. *County Court Judge of Essex* (14), "in the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms and remedies there prescribed and no others, must be followed." To the same effect is the exposition by Lord Halsbury in *Pasmore* v. *Oswaldtwistle Urban Council* (15): "The principle that where a specific remedy is given by a statute, it thereby deprives the person, who insists upon a remedy, of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law." In the case before us,

(1) (1905) I. L. R. 29 Mad. 122. (2) (1903) 8 C. W. N. 73.
(3) (1896) I. L. R. 23 Calc. 532. (4) (1905) 25 All. W. N 85.
(5) (1902) I. L. R. 26 Bom. 785. (6) (1904) I. L. R 28 Bom. 533.
(7) (1908) P. R. 5; 3 P. W. R. (Cr). 13; 7 Cr. L. J. 281.
(8) (1911) P. L. R. 158; 12 Cr. L. J. 216.
(9) (1908) 4 N. L. R. 140; 8 Cr. L. J. 351.
(10) (1903) 6 Oudh Cases. 216.
(11) (1916) 7 Cr. L. R. 381.
(12) (1910) I. L. R. 37 Calc. 714.
(13) (1912) 22 M. L. J. 419; 13 Cr. L. J. 209.
(14) (1887) 18 Q. B. D. 704 (708). (15) (1898) App. Cas. 387 (394).

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the machinery for correction of possible errors is provided in clause (6) of section 195, and, consequently, the party who seeks relief must have recourse thereto and cannot invoke the aid of section 115, Civil Procedure Code, or sections 435 and 439, Criminal Procedure Code. The remedy provided is not restricted in scope; the superior tribunal is not limited to an examination of questions of fact or questions of law alone, but may, upon a review of all the circumstances, either affirm or reverse the order of the primary Court: *Ram Raja* v. *Sheo Dayal* (1); *Jumna Doss* v. *Sabapatty* (2). It is, thus immaterial, whether the remedy provided in clause (6) is regarded as in the nature of an appeal or a revision, specially when we remember that, as explained by Westbury, L. C. in *A. G.* v. *Sillem* (3) and by this Court in *Secretary of State for India* v. *B. I. S. N. Co.* (4), what is technically called revision is only one aspect of the appellate jurisdiction. I am not unmindful that successive applications of section 195 (6) may be necessary, when the primary Court is subordinate in the second degree to a High Court. That recourse may be had to the remedy provided by section 195 (6), in this manner, is shown by numerous decisions, [*Girija* v. *Binode* (5); *Habibar* v. *Khoda Bux* (6); *Palaniappa* v. *Annamalai* (7); *Kannambath* v. *Manathanath* (8); *Muthuswami* v. *Veeni* (9); *In re Narayana Nadan* (10)] though there has been some divergence of judicial opinion on the subject. [*Mata* v. *Baran* (11); *Kanhai* v. *Chhadamem* (12); *Mahammad* v. *Chadda* (13)]. The position then is that the assistance of this Court could, in the present case, have been invoked, only under section 195 (6), Criminal Procedure Code. Under that provision, the only order which Chaudhuri, J. was competent to pass, subject to the observation I shall presently make, was to grant sanction, if he was of opinion that sanction had been refused on erroneous grounds. But I am further of opinion that Chaudhuri, J. had, in the view I take, no jurisdiction to deal with this matter. Under the rules of Court, [Chap. II. Rule V] he would have jurisdiction if this were a matter under section 115, Civil Procedure Code; but as it falls within

(1) (1915) I. L. R. 37 All. 439.
(2) (1911) I. L. R. 36 Mad. 138.
(3) (1864) 10 H. L. C. 704.
(4) (1911) 13 C. L. J. 90 (93).
(5) (1906) 5 C. L. J. 222.
(6) (1906) 5 C. L. J. 219.
(7) (1903) I. L. R. 27 Mad. 223.
(8) (1905) I. L. R. 29 Mad. 122.
(9) (1907) I. L. R. 30 Mad. 382.
(10) (1914) 26 M. L. J. 486.
(11) (1914) I. L. R. 36 All. 469.
(12) (1908) I. L. R. 31 All. 48.
(13) (1915) 13 A. L. J. 709.

section 195 (6), it could be decided only by a Judge or Judges to whom it might have been allocated by the Chief Justice [Cf. *Kali Kinkar* v. *Dinobandhu* (1); *Jamna Doss* v. *Sabapathy* (2). I thus see no escape from the conclusion that the order made by Chaudhuri, J, must be set aside, *first*, because it was made without jurisdiction, and, *secondly*, because it contravened the provisions of section 195 (6). The application must consequently be reheard by such Judge or Judges as may be appointed by the Chief Justice.

When the case comes to be reheard, the question must arise, whether the Court is competent to hold an enquiry into the facts and for this purpose to act on evidence adduced before it or before the subordinate Court under its direction. The cases of *Rama Iyer* v. *Venkatachella* (3) and *Krishna Reddy* v. *Emperor* (4) support the view that the Court does not possess such power under section 195 (6). I am not prepared to accept this proposition as well-founded in law, and in this conclusion I am supported by the decision of Piggot, J. in *Rahamatullah* v. *Emperor* (5). The section does not specify the procedure to be followed by the superior tribunal, and I feel no doubt that the Court has inherent power to take such steps as may be necessary to enable it to discharge the duty imposed upon it. As I had occasion to observe, in the course of my judgment in the case of *Pulin Behary* v. *King Emperor* (6), criminal Courts, no less than civil Courts, exist for the administration of justice, and Courts of both description have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of Justice. [See also *Ahmed Ali* v. *Keenoo Khan* (7)]. I am not unaware that the Criminal Procedure Code does not contain a provision corresponding to section 151 of the Civil Procedure Code; but that section does not lay down any new principle; it merely embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. This inherent power is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiae*, to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that

(1) (1905) I. L. R. 32 Calc. 379. (2) (1911) I. L. R. 36 Mad. 138.
(3) (1907) I. L. R. 30 Mad. 311. (4) (1909) I. L. R. 33 Mad. 90.
(5) (1915) 17 Cr. L. J. 29; 7 Cr. L. R. 402.
(6) (1912) 15 C. L. J. 517 (582). (7) (1908) I. L. R. 36 Calc. 44.

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its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. Let me examine the matter before us in the light of this principle. If the Small Cause Court had adopted the course commended by Turner, L. J. in *Tarakant* v. *Puddomoney* (1) as desirable in all appealable cases, namely, to complete the investigation and pronounce an opinion on all the important points, this Court, in the event of disagreement with the subordinate Court on the question of law, would still have ample material before it to enable it to give judgment on the merits. Inasmuch as such materials have not been recorded by the primary Court, there is no conceivable reason why suitable measures should not be adopted in that behalf, in other words, why steps should not be taken by the superior tribunal to have the evidence recorded either before itself or before the subordinate Court under its direction. Such a step may be necessary, not merely in the interest of the prosecution but also for the protection of the accused. I hold accordingly that when the case is reheard the Court will be at liberty to give such directions as it may deem necessary, for ascertainment of all disputed questions of fact, to enable it to decide whether sanction should be granted or refused.

Babu Sailendra Mohan Dutt:—Attorney for the Appellant.

Mr. J. T. Hume :—Attorney for the Respondent.

A. T. M. *Appeal allowed.*

(1) (1866) 10 M. I. A. 476 (488).

PRIVY COUNCIL.

PRESENT: *The Lord Chancellor (Lord Buckmaster), Viscount Haldane and Lord Atkinson.*

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July, 31, August, 1, October, 26.

THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY AND ANOTHER

v.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Railway—Public street—Street vested in Municipality—Power to cross—Land Acquisition Act (I of 1894)—Indian Railways Act (Act IX of 1890), Sec. 7.

The respondents constructed lines of railway across a street vested by statute in the appellant Municipal Corporation without obtaining their consent, and without taking proceedings under the Land Acquisition Act:

Held, that the provisions of the Land Acquisition Act, do not cut down the power conferred by section 7 of the Indian Railways Act, as amended by section 1 of Act IX of 1896, on a railway company to carry a line of railways across a street, subject to the control of their powers by the Governor-General in Council; and that the construction of the railway lines across the street was not an acquisition of immovable property within the meaning of the said section 7 and that the respondents had power under that section to lay the lines without obtaining the consent of the appellant corporation.

The Great Indian Peninsula Railway Company v. *The Municipal Corporation of the City of Bombay* (1) affirmed.

Appeal, by special leave, from a judgment and decree of the High Court at Bombay (September 5, 1913) reversing the judgment and decree of Beaman, J. (February 17, 1913) at the trial.

The respondent company was incorporated by 12 and 13 Vict. C. 83, and by 63 and 64 Vict. C. 138, all their railways and works were transferred to and vested in the Secretary of State for India in Council.

By section 239 of the City of Bombay Municipal Corporation Act (Bombay Act III of 1888) the streets in that city were vested in the appellant corporation, and by further provisions of that Act were under the control of the second appellant, the Municipal Commissioner.

In 1906 the respondents applied to the appellants for permission to construct railway lines on the level across a public street vested

(1) (1913) I. L. R. 38 Bom. 565.

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in the appellants under the above-mentioned Act. The appellants sought to impose conditions with which the respondents were not willing to comply. Eventually the respondents intimated that they had power to carry out the proposed work under section 7 of the Indian Railways Act, as amended by section 1 of Act IX of 1896, and they subsequently proceeded to lay the lines across the street.

The appellants instituted the suit, giving rise to this appeal, in the High Court claiming (1) a declaration that the respondents were not entitled to take possession of the land forming that part of the street upon which they had laid their lines without the permission of the appellant; (2) a declaration that unless and until the respondents should obtain such permission, or acquire the land under the Land Acquisition Act, they were not entitled to retain possession thereof, or to maintain their lines thereon; (3) that the lines should be removed and the street made good; and (4) damages.

Beaman, J., who tried the suit, decreed it and assessed the damages at Rs. 500. But on appeal that decree was reversed and the suit dismissed. The learned Judges, who heard the appeal, *held* that the respondents were authorised to lay their lines across the street by the Indian Railways Act, as amended and that proceedings under the Land Acquisition Act, were neither necessary nor appropriate. For a full report of the judgments of the Courts in India see *The Great Indian Peninsula Railway Company* v. *The Municipal Corporation of the City of Bombay* (1).

The appellants, thereupon, appealed by special leave to His Majesty in Council. The appeal was argued in March, 1916, but was re-argued by an order of the Board.

July, 31.
August, 1.

P. O. Lawerence, K. C., and *Shelden*, for the Appellants: The street was vested in the appellant corporation by section 289 of the City of Bombay Municipal Corporation Act; they had at least a statutory free-hold in the surface: *Mayor of Tunbridge Wells* v. *Baird* (2); *Foley's Trustees* v. *Dudley Corporation* (3). Having regard to sections 290 and 296, the fee simple in the soil probably vested in them, but the limited title is sufficient for the present argument. The respondents were trespassers. They had no power to lay their lines across the street without the appellants' consent. The power given by section 7 of the Indian Railways Act, could not be exercised without proceeding under the Land Acquisition Act. There was power under that Act to acquire the

(1) (1913) I. L. R. 38 Bom. 565. (2) (1896) L. R. A. C. 434.
(3) (1909) L. R. 1 K. B. 317 (322).

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right to cross the street, since by section 3 (*a*) "land" is defined as including benefits to arise out of land. But even if under that Act a mere right to cross the street could not be acquired, the respondents could, and were bound to, acquire that part of the street upon which their lines were laid. It is true that under section 16 land acquired vests free from incumbrances and that this has been held to terminate any public rights over the land: *Manmatha Nath Mitter* v. *Secretary of State for India* (1). Under sections 40 and 41, however, terms can be imposed for the preservation of public rights, so far as is consistent with the railway crossing. The powers under sections 13 and 14 of the Indian Railways Act, come into operation only after the railway is constructed. In England a railway crosses a highway only under express powers in its special Act; many of the authorities relied on in the judgments upon the appeal are therefore inapplicable.

Sir Robert Finlay, K. C., and *T. T. Paine*, for the Respondents: The respondents had power to lay their rails across the street under section 7 of the Indian Railways Act, as amended, subject to the payment of compensation under section 10. The safety and convenience of the public are adequately provided for by the powers given by sections 13 and 14. The powers conferred upon railways by section 7 are guarded by being made subject to the control of the Governor-General in Council. The right to carry lines over the street was not an acquisition of immovable property within the meaning of section 7. A consideration of the machinery of the Land Acquisition Act, shows that it is not applicable to the acquisition of a right to carry a railway across a street. There is no power under that Act to acquire an incorporeal right: *Shyam Chunder Mardraj* v. *Secretary of State for India* (2) and *Great Western Railway* v. *Cheltenham Railway* (3). If the land itself were acquired there would be cessation of all public rights: *Taylor* v. *Collector of Purnea* (4); but sections 13 and 14 of the Railways Act show that public rights survive. The appellants had not a title under which they could dispose of the land under the Act: *Municipal Corporation of Sydney* v. *Young* (5). There is no reported case in which the Land Acquisition Act has been applied to the acquisition by a railway company of a right to cross a highway.

P. O. Lawrence, K. C., replied.

The judgment of their Lordships was delivered by

(1) (1897) L. R. 24 I. A. 177; I. L. R. 25 Calc. 194.
(2) (1908) I. L. R. 35 Calc. 525.
(3) (1884) L. R. 9 A. C. 787.
(4) (1887) I. L. R. 14 Calc. 423.
(5) (1898) L. R. A. C. 457.

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October, 26.

Viscount Haldane:—The point to be decided on this appeal is whether the respondents in constructing certain lines of railway on the level across the Sewri-Koliwada Road in Bombay, being a public street there under the control of the Municipal Commissioner for the city, have the right to do so without either obtaining permission from the appellant corporation or acquiring under "The Land Acquisition Act, 1894," so much of the street as is occupied by the level crossing. Beaman, J., who tried the action in which the question arose, gave judgment for the appellants, and ordered the restoration of the land with damages. The High Court at Bombay reversed this judgment and dismissed the action.

The question now to be decided is whether the respondents had the right they claimed by virtue of "The Indian Railways Act, 1890," and to answer this question it is necessary to examine the provisions of that Act. The scheme of the Act differs from that of the general Railways Acts in this country, the sections of which are made to apply only if they are brought into operation by a special Act authorising the construction and control of the railway. The Indian Act places the exercise of the powers conferred by it under the control of the executive in the person of the Governor-General in Council, who thus takes the place of Parliament in this country in authorising such powers to be exercised. Section 7 enacts that subject to the provisions of the Act and, in the case of immovable property not belonging to the railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and subject also, in the case of a railway company, to the provisions of any contract between the company and the Government, a railway administration may, for the purpose of constructing a railway, or the accommodation or other works connected therewith, among other things, "make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways or tramways,...... such......arches, tunnels, culverts, embankments, aqueducts, bridges, roads, lines of railway," &c. (the words "lines of railway" being added by section 1 of Act IX of 1896) as the railway administration thinks proper. The railway administration is, by section 10, to do as little damage as possible in the exercise of these powers, and compensation is to be paid for any damage caused by the exercise thereof. By section 11 the railway administration is to make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, among other things convenient crossings and passages over the railway. By section 13 the Governor-General may require

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fences to be provided, and also suitable gates, &c., at places where the railway crosses a public road on the level, and may require the railway administration to employ persons to open and shut such gates. By section 14 where the railway has been made across a public road on the level, the Governor-General may, if it appears to him to be necessary for the public safety, require the construction of a bridge or arch or other works for diminishing danger. By section 104 railway servants commit a punishable offence if they keep a level crossing closed against the public.

The railway, which was duly authorised by the Governor-General, has as already stated been made to cross on the level a road in the area of Bombay city. This road is vested in the appellants under "The City of Bombay Municipal Act, 1888," and the effect of such vesting is that, like an Urban Authority under the Public Health Act in this country, they have the surface and a portion of the sub-soil vested in them in such a fashion as to enable them to bring an action for trespass.

The real point that arises is whether, under the words quoted from section 7 of the Indian Railways Act, which make the powers conferred by that section subject to any enactment in force for the acquisition of land for public purposes and for companies, it was necessary for the respondent before making the crossing to comply with the provisions of the Act which was then in force, "The Land Acquisition Act, 1894," passed four years after the Indian Railways Act. The Land Acquisition Act by section 3 defines land as including benefits to arise out of land, and a person interested as including a person interested in an easement affecting the land. The early parts of the Act (II to VI inclusive) enable the Local Government to acquire land compulsorily for public purposes. When the Collector, who is the official designated to do so, has ascertained the compensation to be allowed and the proper apportionment among the persons interested, he may take possession and then, under section 16, the land is to vest absolutely in the Government free from all encumbrances. It is conceded that "encumbrance" includes a right of passage. The taking possession by the Collector would therefore, if the Act applies to the present case, extinguish the rights of the public to cross the railway by the road in controversy. Moreover, none of the provisions relating to compensation cover the case of members of the public, who naturally do not come within the provision for compensation contained in section 11.

Part VII of the Act enables the Local Government to authorise companies generally to acquire land for useful public purposes by

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availing themselves of the provisions in the earlier parts, but section 39 provides that this power shall not be put in force unless the previous assent of the Local Government has been obtained, and unless an agreement has been entered into by the company with the Secretary of State for India.

It appears to their Lordships that the provisions of this Act are not so expressed as to cut down the power conferred by section 7 of the Indian Railways Act on a railway company in India to carry a line of railway across a street, subject to the control of their powers by the Governor-General. The latter Act in such a case contemplates the right of the public being kept alive. Section 13 enables the Governor-General to direct the provision by the railway administration of suitable gates, bars, &c., where the railway crosses a public road on the level. Section 14 gives him power to require the provision of bridges or arches where he deems it necessary, or such other works as will remove or diminish the danger arising from the level crossing. These sections show that the right of the public to cross the railway so laid on the level is contemplated as continuing. Section 104 makes it a criminal offence to keep the level crossing closed against the public, and raises the same inference. The Acquisition of Land Act does not repeal these sections, and it appears to their Lordships that the taking of the railway on the level across a public highway is accordingly not an acquisition of immovable property within the meaning of this Act. To hold otherwise would be to hold that the right of the public to cross was extinguished under section 16, or, again, that when one railway crossed another—a possibility expressly contemplated by section 7 of the Indian Railways Act—the second was bound to purchase part of the permanent way of the first, conclusions which their Lordships regard as inadmissible. It may well be that when a railway company takes land for a station or for a tunnel or a cutting, the provisions of the Act apply, on the ground that this is an acquisition of land. But the sections in the Indian Railways Act to which they have referred in their opinion show that what has been done in this case is excluded by that Act from possessing this character, notwithstanding that theoretically a benefit arising out of land, within the words of section 3 of the other Act, might in a different context be held to have been acquired. This has probably been done because the interference with the surface is small and the public advantage is great. They think that it was intended by the Indian Railways Act to give the Governor-General power to authorise the crossing, in place of leaving the conferring of such a

power to a special statute, as would be the case in England, where the General Lands and Railways Clauses Acts do not authorise the compulsory taking of mere easements. The Governor-General has, under section 10 and other sections, ample power to impose conditions for compensation and for the protection of the public.

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For these reasons their Lordships will humbly advise His Majesty that the judgment of the High Court at Bombay was right, and that this appeal should be dismissed with costs.

Cameron, Kemm & Co. :—Solicitors for the Appellants.
White, Borrett & Black :—Solicitors for the Respondents.

J. M. P. *Appeal dismissed.*

PRESENT : *Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.*

CHHATRAPAT SINGH DUGAR

v.

KHARAG SINGH LACHMIRAM AND OTHERS.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

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1916.
March, 14.
November, 1.

Insolvency—Order of adjudication—Statutory right of debtor to such order on complying with the terms of the Act—Provincial Insolvency Act (Act III of 1907), SS. 5, 6, 14, 15, 16.

The Provincial Insolvency Act, entitles a debtor to an order of adjudging him an insolvent when its conditions are fulfilled. This does not depend on the Court's discretion, but is a statutory right.

The stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding.

Appeal from an order of the Calcutta High Court, (Brett and Sharfuddin, JJ.) dated April 12, 1912, affirming an order of the District Judge of Murshidabad.

Chhatrapat Singh Dugar being heavily in debt and pressed by sundry creditors, conveyed many of his immovable properties to various relations, who preferred claims to such properties when any creditor took them in execution. Such devices at length proving unavailing, Chhatrapat applied to the Calcutta High Court under the Presidency Insolvency Act (11 Vict., C. 21) to be declared an insolvent, but his application was refused on June 7, 1907 by Woodroffe, J.,

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who characterised it as an abuse of the Court's process, and an appeal against such order was dismissed on November 26th, 1907. His creditors renewing their efforts against his property, Chhatrapat on May 21, 1909 presented an insolvency petition to the District Court of Murshidabad under the Provincial Insolvency Act (III of 1907). This petition was opposed by certain creditors, and affidavits filed alleging various acts of bad faith by Chhatrapat. The District Judge, relying on these affidavits, held that he had no reason to differ from Woodroffe J. that the application was "an abuse of the process of the Court" and dismissed it. An appeal was preferred to the High Court, but summarily dismissed under Order 41, Rule 11 of the Code of Civil Procedure, 1908.

The present appeal was part heard on March 14, 1916, when *Mr. Duke* for respondents submitted that in the absence of the affidavits on which the District Judge relied the Board could not properly hold that the lower Courts erred in their view that the application was an abuse of the process of the Court. The appeal was therefore adjourned for copies of the affidavits, which on receipt proved merely to set out the alleged fraudulent and dishonest conduct of the petitioner before filing his petition and to suggest that his only object in filing it was still further to impede the creditors who were pressing him.

At the hearing on November 1, 1916, *Sir Erle Richards K. C.*, and *Sir W. Garth*, for the Appellant, submitted that the Court could not refuse to make an order of adjudication on the sole ground that the debtor has in the past endeavoured to defeat or delay his creditors. There have been two sets of Acts in England : (1) for the relief of debtors and (2) for the administration of estates in bankruptcy. In India till 1907 only the first existed ; and a debtor could only get relief under certain provisions of the Civil Procedure Code designed primarily for his benefit. But Act III of 1907 alters this : it follows the English Bankruptcy Act of 1883, (46 and 47 Vict, c, 52) of which it reproduces sections 7 and 8. Under the English Act it is well settled that in the case of a debtor's petition the receiving order follows as a matter of course : you do go into the debtor's conduct but at a later stage. The decision of Woodroffe, J. was under 11 and 12 Vict., C. 21, and the District Judge was wrong in applying the same reasoning to a totally different statute. Under the Provincial Insolvency Act, once the debtor complies with the provisions of sections 5, 6 and 12, the Court has no option but to make an order of adjudication. Sections 15 and 16 must be read together : the words "that for any other sufficient cause no order

ought to be made" do not apply to a debtor's petition, but only to a creditor's.

The decision against which we appeal is opposed to a long series of decisions in India both before and after it: *Udai Chand* v. *Ram Kumar* (1); *Samiruddin* v. *Kadumoyi Dasi* (2); *Kali Kumar Das* v. *Gopi Krishna* (3); *Abdur Reyak* v. *Basimddin Ahmad* (4); *Girwardhari* v. *Jai Narain* (5); *Trailoki Nath* v. *Badu Das* (6); *Bava Jeer* v. *Bava Rangaswami* (7).

Here and there as in the last case, mention is made of the inherent power of the Court to refuse an application on the ground that it is an abuse of the process of the Court: but the Act does not countenance any such refusal. It is not necessary for us to argue that there cannot be circumstances which would constitute such an abuse, but certainly there are none such here. In England there have been two or three cases where applications have been dismissed on such a ground, but the circumstances of all of them are very peculiar and quite unlike the present case. Reference was also made to *In re Betts* (8); *In re Painter* (9); *In re Hancock* (10).

In the present case the petition it now appears was dismissed because the debtor, previous to filing it, had committed acts of bad faith. This was no ground for such dismissal: the debtor's past frauds may be considered when he wants his discharge under sections 44 and 45 of the Act, but cannot prevent the order of adjudication, which is made to secure the administration of his assets for his creditors' benefit.

L. De Gruyther K. C., and *Dube*, for respondents: In the mufassil before 1907 the Court admittedly had a discretion: and under 11 and 12 Vict., C. 21, as administered in Calcutta, the Court still has a discretion. The question is whether the new statute has made a material alteration, so that the law in the mufassil is different from that in the Presidency towns. The word "may" in section 5 continues the discretion of the Court, unless that word means "must" the decision appealed against is right. The debtor's object in filing this petition is absolutely fraudulent; it is to stave off the evil day. Section 15 of the Act should be read with section 14; the words "or for any other sufficient cause" in section 15 refers to section 14 (2) which lays down that the conduct of the debtor is to

(1) (1910) 15 C. W. N. 213.
(2) (1910) 15 C. W. N. 244.
(3) (1910) 15 C. W. N. 990.
(4) (1911) 17 C. W. N. 405.
(5) (1910) I. L. R. 32 All. 645.
(6) (1914) I. L. R. 36 All. 250 F. B.
(7) (1911) I. L. R. 36 Mad. 402.
(8) (1901) 2 K. B. 39.
(9) (1895) 1 Q. B. 85.
(10) (1904) 1 K. B. 585.

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be considered. There is no object for that provision if the Court has to declare him insolvent whatever it thinks of his conduct. In several of the Indian cases cited the Court's power to dismiss a debtor's petition has been recognised: vide especially the remarks of Chamier, J. in *Girwardhari* v. *Jai Narain* (1).

The word "may" in section 5 should be given its natural meaning in the absence of clear provision to the contrary: *Delhi and London Bank* v. *Orchard* (2).

It is unlikely that by "may" here the Legislature meant "must", for that would mean one law in the mufassil and another at the Presidency town.

If this be a matter of discretion, two Courts in India have concurred as to how such discretion should be exercised.

No reply was called upon.

Their Lordships' judgment was delivered by

November, 20.

Sir Lawrence Jenkins:—Chhatrapat Singh Dugar, the present appellant, on the 21st May, 1909, presented as a debtor an insolvency petition under the Provincial Insolvency Act, 1907, to the District Court of Murshidabad for an order adjudging him an insolvent.

His application was opposed by the present respondents and was dismissed. The debtor's consequent appeal to the High Court in Bengal was dismissed by an order of the 12th April, 1912, and an application for review of the High Court's judgment was equally unsuccessful. This appeal has been preferred by the debtor to His Majesty in Council from the High Court's order of the 12th April, 1912.

The Provincial Insolvency Act presents a complete and exact delineation of a debtor's right to an order of adjudication, on his own petition. Subject to the conditions specified in the Act, if a debtor commits an act of insolvency an insolvency petition may be presented by the debtor, and the Court may on such petition make an order adjudging him an insolvent. The presentation by him of a petition is deemed an act of insolvency, and on that petition the Court may make an order of adjudication (section 5).

Provision is made by the 6th and succeeding sections for the presentation and admission of the insolvency petition, and other matters of procedure, but no express reference to them need be

(1) (1910) I. L. R. 32 All. 645 (650).
(2) (1877) L. R. 4 I. A. 127 (135); I. L. R. 3 Calc. 47.

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made in the circumstances of this case. It will suffice to say that all that is thus prescribed has been observed by the present debtor.

By the 14th section it is enacted that on the day fixed for the hearing of the petition or on any subsequent day to which the hearing may be adjourned, the Court shall require proof that the debtor is entitled to present the petition, and shall examine him if he is present.

Then it is provided by sections 15 and 16 as follows:—

"15 (1). Where the Court is not satisfied with the proof of the right to present the petition or of the service of notice on the debtor as required by section 12, sub-section (3), or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

"16 (1). Where a petition is not dismissed under the preceding section......the Court shall make an order of adjudication."

The dismissal of Chhatrapat's petition by the District Court does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. Presumably it was on this ground, too, that the High Court dismissed the appeal; no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an "abuse of the process of the Court." This case illustrates the peril of this doctrine in India, for what has been treated by the Courts below as such an abuse appears to their Lordships in no way to merit this censure. It may, perhaps, give rise to a contest for priority between competing creditors, but that will be, if necessary, a matter for decision hereafter in the course of the insolvency. Be that, however, as it may, their Lordships are now concerned only with the debtor's position; and as to that they are satisfied that he has complied with all the conditions specified in the Act, and is entitled as of right to an order adjudging him an insolvent. This conclusion, apart from the decision under appeal, is in agreement with the current of authority in India, where it has

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been rightly held that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding. As the dismissal of Chhatrapat's petition was, in their Lordships' view, erroneous, they will humbly advise His Majesty that the order of the High Court of the 12th April, 1912, be reversed with costs, and in lieu thereof an order be made discharging the order of the District Court and adjudging Chhatrapat Singh Dugar an insolvent. The respondents will pay the costs of this appeal.

C. G. Farr:—Solicitor for the Appellant.

Barrow, Rogers and Nevill :—Solicitors for the Respondents.

J. M. P. *Appeal allowed.*

PRESENT: *The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.*

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SRIPAT SINGH DUGAR AND ANOTHER

v.

MAHARAJAH SIR PRODYOT KUMAR TAGORE AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Hindu Law—Mitakshara—Execution sale under decree against father—Sale of right, title and interest of judgment-debtor—What passes under such sale.

By the Mitakshara law a judgment against the father of the family can be executed against the whole of the joint family property in every event but one, viz., that the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes; and the presence of the words "right title and interest of the judgment-debtor" in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import, where the father of a joint family is the judgment-debtor, that nothing is sold but his interest as a co-sharer. In cases of this kind the substance, and not the mere technicalities of the transaction, should be regarded: *Rai Babu Mahabir Pershad v. Rai Markunda Nath Sahai* (1) followed.

Simbhunath Panday v. Golab Sing (2) referred to.

(1) (1889) L. R. 17 I. A. 11; I. L. R. 17 Calc. 584.
(2) (1887) L. R. 14 I. A. 77; I. L. R. 14 Calc. 572.

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Sripat Singh
v.
Prodyot Kumar.

Appeal from a decree of the Calcutta High Court, (Woodroffe and Carnduff JJ.) dated February 3, 1911, reversing two decrees of the Subordinate Judge of Burdwan, dated the 14th May, 1909.

Chhatrapat Singh was the father of a joint family governed by the Mitakshara law. Benimadhab obtained a decree against him and in execution attached the family property. Chhatrapat's sons (the present appellants) sued Benimadhab for a declaration that their shares were not liable to sale. Pending this suit which was eventually dismissed, the property attached (a patni taluk) was sold and purchased by the decree-holder. A consent order had been passed that the words "right, title and interest of the judgment-debtor" should be inserted in the proclamation, and the sale certificate contained similar words.

The question for determination on this appeal was as to what passed by the sale. The Subordinate Judge held that only Chhatrapat's undivided share passed, while the High Court (Woodroffe and Carnduff, JJ.) held that what was sold was the whole property over which Chhatrapat had disposing power.

Hence this Appeal.

De Gruyther, K. C, and *Sir W. Garth*, for the Appellants: The Subordinate Judge was right. Chhatrapat was a co-sharer in a joint family and it was only his interest as such which was attached and sold. The purchaser at such sale acquires merely the right to compel a partition against the other co sharers: *Deendayal Lal* v. *Jugdeep Narain Singh* (1); *Baboo Hurdey Narain Sahu* v. *Rooder Perkash Misser* (2); *Simbhunath Panday* v. *Golab Singh* (3).

Sir R. Finlay, K. C., and *Dunne*, for the Respondents, submitted that it was now too late to take the point that only the interest which Chhatrapat would have obtained on partition was included. Such point was not raised in the pleadings and the Subordinate Judge should not have allowed it to be brought forward when the suit has been framed in another and inconsistent way, and indeed assumes that as a matter of fact the whole property was sold. The appellants' present case is a mere after-thought: their first case was that the debt was contracted for immoral purposes.

The whole property passed under the words "right title and interest." Beyond question Chhatrapat had power to bind the whole property, and both Courts have held that the debt was legal and binding.

(1) (1877) L. R. 4 I. A. 247; I. L. R. 3 Calc. 198.
(2) (1883) L. R. 11 I. A. 26; I. L. R. 10 Calc. 626.
(3) (1887) L. R. 14 I. A. 77; I. L. R. 14 Calc. 572.

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In execution proceedings the Court will look at the substance of the transaction, not at mere technicalities: *Bissessur Lal Sahoo v. Maharaja Luchmessur Singh* (1), and *Rai Babu Mahabir Pershad v. Rai Markunda Nath Sahai* (2). The words "right title and interest" were inserted here merely to ensure that the appellants should not be prejudiced by the sale if their suit succeeded on the merits; but it has failed.

De Gruyther, K. C., replied: The decree-holder contended that the property was governed by the *Dayabhaga*, while Chhatrapat alleged that the *Mitakshara* applied. The injunction which appellants obtained was dissolved because in any case the father would have a share. The parties were satisfied so long as Chhattrapat's interest only was sold.

Their Lordships' judgment was delivered by

November, 10.

The Lord Chancellor.—The point to be decided in this case is extremely simple, and it is this: What was the extent of the estate that passed on the sale, under a decree of the Court of the 13th August, 1904, of "the right, title, and interest" of a judgment-debtor in certain property? There is no doubt whatever that all parties considered that the entire estate had been sold under the order. The price was based upon that hypothesis, and the present appellants were so much impressed with this view that they instituted proceedings for the purpose of obtaining a declaration, that in the special circumstances of the case only one-third was properly liable to attachment. The grounds for that action were these: The property in question was joint property, governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone. In the proceedings so instituted the plaintiffs accordingly alleged that the consideration for the debt was illegal and immoral, and on this allegation obtained an *ex parte* injunction restraining the sale of the whole of the estate which was then admittedly the subject of advertisement, and a formal application was subsequently made, asking that the injunction might be continued. Upon the hearing of that application it was urged by the appellants that their case as to the illegality and immorality of the consideration for the debt being still

(1) (1879) L. R. 6 I. A. 233; 5 C. L. R. 477.

(2) (1889) L. R. 17 I. A. 11; I. L. R. 17 Calc. 584.

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under consideration, the Judge ought to suspend proceedings under the execution decree until that point had been determined, and upon this application the order was made which has given rise to the dispute. The appellants were quite willing that the order should be amended by adding the words "right, title, and interest," and to this request the learned Judge acceded. The words so used are undoubtedly ambiguous [*Simbhunath Panday* v. *Golab Singh* (1)], and lend colour to the contention that they only cover the actual third which the judgment-debtor possessed in his own right, and leave unaffected the two-thirds which, though capable of being bound by the order, were not in fact the property of the debtor at all. It therefore becomes necessary to examine the facts and circumstances which led to their introduction (*Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* (2). The learned Judge stated this reason in plain language. He said that the addition of those words would not be calculated to affect the case of either party, and upon that footing they were introduced.

Now there is only one hypothesis upon which the introduction of those words could have left the rights of either party unaffected, and that is, by so construing the order that if the plaintiffs succeeded in establishing that the debt had been incurred for immoral purposes, only one-third would be affected by the decree, while if they failed in that contention, as was ultimately the case, the whole of the estate would remain subject to the order for sale.

That, in their Lordships' opinion, is what the order meant, and had it effected anything else the result would have been that, without any reason at all, the Judge would have deprived the execution creditor of the undoubted right that he possessed, except upon the happening of one event, which, in the result, has never arisen, to sell the entirety of the estate.

Their Lordships are in entire agreement with the view expressed in the case *Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* (2)—to which Sir Robert Finlay called their attention, that in cases of this kind it is of the utmost importance that the substance, and not the mere technicalities, of the transaction should be regarded.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, with costs to the respondents, who appeared.

C. G. Farr. :—Solicitor for the Appellants.

Vallance & Vallance :—Solicitors for the Defendants.

J. M. P. *Appeal dismissed.*

(1) (1887) L. R. 14 I. A. 77; I. L. R. 14 Calc. 572.

(2) (1889) L. R. 17 I. A. 11; I. L. R. 17 Calc. 584.

PRESENT: *The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.*

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MUTU K. A. RAMANADAN CHETTIAR

v.

VAVA LEVVAI MARAKAYAR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS].

Mahomedan Law—Deed of settlement—Wakf—Gift in perpetuity by a Mahomedan to his family, following a gift to charitable purposes—Under what circumstances such gift is valid—The Mussalman Wakf Validating Act, (VI of 1913) S. 3.

The Mussalman Wakf Validating Act though in terms declaratory, is not retrospective, and in the case prior to the Act a gift for the maintenance and support, wholly or partially, of the settlor's family, children or descendants is not *per se* a good and valid Wakf. The test to be applied in such cases is that laid down in *Mujibunnissa* v. *Abdul Rahim* (1). The gift will be valid if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the donor's family.

To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor, the amount of the property, the nature and the needs of the charity, their probable or possible expansion, the priority of their claim upon the settled fund, and such like.

Ramanadan Chettiar v. *Vava Levvai Marakayar* (2) affirmed.

Appeal from a decree of the Madras High Court, (2) affirming a decree of the District Judge of Tanjore.

In 1893 two Hanafi Mahomedans, A. N. Marakayar and A. K. S. Marakayar, settled a part of their property in trust to apply an indefinite part of the income to religious ceremonies and alms-giving and to apply the residue for the benefit of their descendants. Two paid trustees were appointed, each a son of one of the grantors. The provisions of the deed are analysed in a passage of the High Court's judgment cited by their Lordships.

Later on the grantors became embarrassed, and the appellant, who was their execution-creditor, attached the settled lands. These being released on a claim by respondents, he brought the present suit for a declaration that he was entitled to bring them to sale in execution of this decree, and pleaded (*a*) that the deed was not valid as a deed of trust (*b*) that it was executed to defeat and

(1) (1900) L. R. 28 I. A. 15 (23); I. L. R. 23 All. 233.
(2) (1910) I. L. R. 34 Mad. 12.

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defraud creditors. The Subordinate Judge of Nagapatam, who tried the suit, found (*b*) in the negative: as to (*a*) he held that the deed was valid only to the extent of Rs. 600 per annum at which he estimated the amount to be spent in charity and the remuneration of the trustees. Both sides appealed to the District Judge of Tanjore, who held that the gift to charity validated the whole of the deed and dismissed the suit altogether. An appeal by the creditor was dismissed by the Madras High Court (Benson and Abdur Rahim JJ.), who held that the trust for the settlors' family failed, but that under Mahomedan law it followed that the entire income should go to the charitable uses, and that hence there was nothing for the creditor to attach. For a report of the case see *Ramanadan Chettiar* v. *Vava Levvai Marakayar* (1). Hence this appeal.

L. De Gruyther, *K. C.*, and *Kenworthy Brown* for the Appellant: The whole settlement is bad. The High Court erred in holding that because the gift to the family was bad the whole property should go to charitable purposes. The gift to charity is illusory. The deed must be looked at as a whole. As to the nature of wakf, see Baillie's Mahomedan Law, page 557. To be valid, a wakf must primarily be for religious or charitable objects. Where the primary object is to benefit the donor's family, this Board has always held, that no valid wakf is created: *Mujibunnissa* v. *Abdur Rahim* (2); *Ahsanulla Chowdrey* v. *Amarchand Kundu* (3); *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdry* (4). Under this deed nothing is given for charitable purposes. It is left entirely to the trustees to say what shall be given for *Fateha*, *Kuthum* &c. In substance the gift is for the benefit of the settlors' family, but there is annexed an obligation, more or less binding but very difficult to enforce, to spend an indefinite sum on charity.

[*The Lord Chancellor*: drew attention to the inordinate delay on appellant's part. It appeared that the record was received in England in December 1914; and that in June 1916, the Board called on the appellant to show cause why the appeal should not be dismissed for want of prosecution].

If the charitable object is not illusory, I admit that the whole gift is good; but when it is illusory, the whole is bad. The test is what is to become of the bulk of the property, and here the trustee can give to charity as much or as little as they please.

Kenworthy Brown followed: A perpetual family settlement

(1) (1910) I. L. R. 34 Mad. 12.
(2) (1900) L. R. 28 I. A. 15; I. L. R. 23 All. 223.
(3) (1889) L. R. 17 I. A. 28; I. L. R. 17 Calc. 498.
(4) (1894) L. R. 22 I. A. 76; I. L. R. 22 Calc. 619.

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made by a Mahomedan is not valid as a wakf merely because there is an illusory gift to the poor, or even trifling gift which is not illusory: *Meer Mahamed Israil Khan* v. *Sashti Churan Ghose* (1), where the contrary view was taken, was overruled by this Board's decision in *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdry* (2). The head-note to the report of the latter case (2) is wrong: it did not overrule *Bikani Mia* v. *Shuk Lal Poddar* (3), but merely the dissenting judgment of Mr. Ameer Ali; the decision itself is in my favour.

The gift to charitable objects must be substantial; the gift of a small amount will not suffice, when the main object is to keep property in the family: *Maulvi Saiyid Muhkhammad Munawar Ali* v. *Razia Bibi* (4).

It is sufficient that the amount devoted to charity should be reasonable, but here it is quite indefinite and illusory. The trustees have a discretion to set aside the income for the purchase of immovable property; and the income of such property will go to increase the portion of the family. The persons who have power to call the trustees to account are the very persons who are interested that the share of the family should be as large as possible. The High Court are not carrying out the settlors' intention in devoting the entire property to charitable purposes. We say (1) the settlors' dominant purpose was to provide for their family (2) the provision for charity is illusory (3) the settlors' intention was that the surplus left after expenditure on charity should be a separate fund for the benefit of their family only, not that it should go to the charitable objects made or to any charitable objects.

E. B. Raikes, for the respondents: The plaint is badly framed. The trustees are not sued *qua* trustees, and the charitable interests are not represented. The proper procedure was to bring the Advocate-General on the record as representing the trusts. As the suit is framed the deed cannot be set aside.

(*The Lord Chancellor*; It would be very undesirable at this stage to decide the case on that ground.)

Anything you decide now will not bind the Advocate-General. The public is not represented.

The trust is good. The attack upon the settlors' solvency at the time of execution has failed. They only get into difficulties later through losing a ship.

(1) (1892) I. L. R. 19 Calc. 412.
(2) (1894) L. R. 22 I. A. 76; I. L. R. 22 Calc. 619.
(3) (1892) I. L. R. 20 Calc. 116.
(4) (1905) L. R. 32 I. A. 86; 2 C. L. J. 179; I. L. R. 27 All. 320.

The cases cited for appellant merely show that a gift in perpetuity for a man's family is not valid for that purpose, they were useful before Act VI of 1913. But it has never been held that where you settle a substantial part of your property on approved charitable objects, the residue cannot be settled in perpetuity on your family. That point is expressly reserved in *Ahsanulla Chowdrey* v. *Amarchand Kundu* (1).

[*The Lord Chanceller* referred to *Paul Chand* v. *Akbar Yar Khan* (2)].

That is an express decision to the contrary. The gift to the children here is of the mere casual overflow. The provision for the trustees is ancillary to the charities and may be regarded as being itself a charitable purpose. The customary expenditure on the charities has been substantial, and that *fatehas* would increase on the settlors' deaths. The reason why no amount is prescribed is because the funds available fluctuate. A fixed sum is not specified, because under the general provision all who seek must receive—Ameer Ali's Mahomedan Law (3rd ed. 1904) p. 221. The surplus is not a definite thing. If the poor come and are refused alms, they could go to the Advocate-General and say that the primary trust was that they should be fed.

A wakf has been held valid, though $\frac{2}{3}$ of the property was to go to the family, because the $\frac{1}{3}$ which was to go to charity was not to be reduced : *Buzlal Ghani* v. *Adak Patari* (3).

Even when part of the wakf is bad, the charitable objects are always good : *Mahomed Ahsanulla Chowdrey* v. *Amarchand Kundu* (1) is the only case which has come before this Board where it has been held, but there are numerous decisions in India to the same effect.

If no salary were provided in the deed, the trustees could go to the Court for remuneration. The provision for accumulation implies that the accumulations are to be held on the original trusts. The settlors have only settled $\frac{1}{3}$ of their property, and there was no trust whatever for themselves.

Kenworthy Brown replied.

Their Lordships' judgment was delivered by

Lord Atkinson :—This is an appeal from the decree of the High Court of Judicature at Madras, dated the 8th February, 1910, affirming the decree of the District Judge of Tanjore, dated the 23rd

December 1.

(1) (1889) L. R. 17 I. A. 28 ; I. L. R. 17 Calc. 498.
(2) (1896) I. L. R. 19 All. 211. (3) (1913) 17 C. W. N. 1018.

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April, 1906, which varied the decree of the Subordinate Judge of Negapatam, dated the 28th March, 1901.

The suit out of which the appeal arises was brought for a declaration that the plaintiff was entitled to bring certain lands to sale in execution of a decree obtained by him. The lands in question were comprised in a trust deed dated the 28th July, 1893, whereby they were settled substantially in trust to apply an indeterminate portion of the income for the due performance of customary *fatehas* for ancestors and to almsgiving, and to apply the residue of the income in perpetuity for the benefit of the defendants and their descendants without power of alienation.

The grantors in this deed, named Ahmed Naina Marakayar and Asan Kutu Saheb Marakayar, were brothers. They were both Mahomedans of the Hanafi sect. At the date of the deed they were men of considerable means, owning property worth a lac of rupees. The value of the land comprised in the deed was about one-fifth of that amount. Subsequently to the date of the deed they met with considerable losses. The appellant was their execution creditor, and in that capacity obtained the above-mentioned decree. If the deed of the 28th July, 1893, be absolutely void, he would be entitled to the relief he seeks; if it be not wholly void, his suit must fail.

This is all admitted. The respondents are the sons and grandsons of the two grantors. Those of them numbered 1 and 2 are respectively their sons. They are also the trustees named in the deed. Thus the sole question for decision in the case is whether this deed is a good and valid deed of wakf, or is wholly void. It has been found by the Subordinate Judge, before whom the case was tried, that the deed was not made to delay, hinder, or defraud creditors. That finding has not been questioned on this appeal. The case of the appellant is that the effect of the deed is to give the property comprised in it in substance to the grantors' family in perpetuity, and that it is therefore not a valid deed of wakf, while the case of the respondents is that its effect is to give that property in substance to charitable uses, and that therefore it is a good and valid deed of wakf.

The provisions of the deed are carefully analysed in the following passage in the judgment of the High Court :—

"The deed begins with a recital that the property, consisting of two villages of the total value of 20,000 rupees, is given for the purpose of charity, and then states that out of the gross yields the

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melvaram, repairs, salaries for servants, maganam, and other important expenses are to be defrayed; and the balance of the income is to be divided in three shares. From two shares out of the three shares of the income, the Dharmakartas or trustees appointed by the deed and their successors are to take 10 rupees per mensem as salary for discharging their duties; and as regards the remainder of the two shares, the direction to the trustees is as follows: 'You should perform annually without failure the customary (not "the annual" as wrongly translated in the paper book) *Pattah* (meaning *Fateha*), *Kuthum* (meaning *Khatam)*, &c., for our ancestors and for us after our decease. You should annually give in the month of Ramzan to the *mikins* or the poor, *ujivanam*, *i.e.*, food, *udumanam*, *i.e.*, clothes, *sadaka* meaning alms, *jaggath*, &c. The surplus should be divided in equal shares once a year by our heirs or their sons, grandsons in existence from generation to generation inclusive of you.' The third share of the income after paying the expenses is to be utilised in purchasing other immovable property which is 'to be added to the said charity properties and dealt with according to the above terms'; and if in any year no immovable property is bought with the one-third of the net income, the amount is to be added to the two-thirds and 'divided according to the above particulars.' Two sons of the two executants were appointed Dharmakartas or trustees of the deed; and it is provided that their successors should be male members of the family not exceeding three in number; the heirs of the donors should be entitled to call upon the trustees to render proper account of the management, and to remove such of the trustees as may be guilty of mismanagement, and appoint competent men in their place. The Dharmakartas and the successors, the heirs, and the descendants are not to receive more than the shares allotted to them out of the income; and they will not be entitled to alienate the properties, nor will the properties be liable for their debts."

Their Lordships have little doubt but that the grantors executed this deed in the belief that the gift in perpetuity to their families and their descendants which it contains was according to the law governing the matter, namely, the Mahomedan law, a good gift to a charitable use. There is a good deal of authority in support of that view, especially amongst the earlier writers, and by the Act 6, 1913, passed by the Governor-General of India in Council, subsequently to the date of the decision appealed from, the law in India has been brought into conformity, in this respect, with the opinion of these writers. By section 3 of that statute it is expressly enacted that it shall be lawful for any person professing the Mussulman faith

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to create a wakf, which in all other respects is in accordance with the provisions of the Mussulman law, "for the maintenance and support, wholly or partially, of his family, children, or descendants." It was not contended that this statute affects the present appeal, and the following decisions of this Board, which their Lordships think they are bound to follow, clearly establish that the Mahomedan law, as interpreted by the Board, does not treat such a gift *per se* as a good and valid wakf. These decisions are *Mahomed Ahsanulla Chowdrey* v. *Amarchand Kundu and others* (1); *Abul Fata Mahomed Ishak and others* v. *Russomoy Dhur Chowdry and others* (2); and *Mujibunnissa and others* v. *Abdul Rahim and Abdul Aziz* (3). In this case (at p. 23) Lord Robertson said :—

"Their Lordships have, however, considered the question whether even assuming it to have been registered, the deed is, according to its terms, a valid deed of wakf. It will be so if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family."

All the Courts before which this case has come have adopted the test thus laid down by Lord Robertson, and its accuracy has not been questioned on this appeal. To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor, the amount of the property, the nature and the needs of the charity, their probable or possible expansion, the priority of their claim upon the settled fund, and such like. It was not shown, or indeed contended, on the hearing of this appeal, that the High Court was not right in its conclusion that a certain word in the trust deed which should have been translated as "customary," had in fact been translated "annual." No doubt this alleged mistranslation had not been pointed out either in the Court of the Subordinate Judge or in that of the District Judge, but their Lordships think they must assume that the Judges of the High Court satisfied themselves that the mistranslation had taken place, and are of opinion that under the circumstances the deed must now be read and construed as if the words "the customary" had been substituted at the place indicated for the words "the annual." The Subordinate Judge at pages 327—329 classifies the charitable objects provided for in the deed under four heads :—

(1) (1889) L. R. 17 I. A. 28; I. L. R. 17 Calc. 498.
(2) (1894) L. R. 22 I. A. 76; I. L. R. 22 Calc. 619.
(3) (1900) L. R. 28 I. A. 15; I. L. R. 23 All. 233.

1. Cash doles to the poor on the 28th and 29th of the Ramzan month, which among Mahomedans is regarded as a holy month in which giving alms to the poor is enjoined as a duty.

2. Distribution of clothes to the poor on those days.

3. Distribution of *conjee* to the poor on a *misjed* during the thirty days of that month (Ramzan).

4. Performance of *fateha* on three days of ancestors, and feeding of friends and the poor.

The word "wakf" is not used in the deed, but it is not pretended that these objects are not, according to Mahomedan law, which governs the case, charitable objects, or that the grant to trustees to promote them did not create a good charitable trust. The trusts too are active trusts, troublesome to discharge, and the petty salary given to the trustees may accordingly well be held to have been given to them as remuneration for their trouble in this respect, and therefore as part of the expenditure on the charitable objects.

The Subordinate Judge estimated that it would be necessary to spend 230 to 260 rupees per annum on the first three of these charitable objects, and 100 rupees per annum on the fourth, making in all 360 rupees, which, with the salary of the trustees, would amount to 600 rupees per annum, leaving, since the income of the trust estate was estimated at 1,500 rupees per annum, a balance of about 900 rupees per annum to feed the grant in perpetuity to the family and descendants of the grantors. Much stress was laid by the appellants on the fact that only two-fifths of the income would be devoted to the charity, while three-fifths would go to the family. But these figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently, and the needs of the charity may expand. The number of poor people usually relieved, which is put by the first defendant at 2,500 to 3,000, and by the third, fourth, and fifth witnesses examined on his behalf at 2,000, may vastly increase, since their only necessary qualification is that they should be Mahomedans and be poor. It is not necessary that they should be inhabitants of any particular town or district, and it is obvious that the number of applicants for or objects of relief would tend to depend upon the distress prevailing amongst the Mahomedan population in the districts within reach of the place of distribution, namely, the home of the trustees. The expenses of the *fateha* will be increased by what has already occurred—the deaths of the two grantors. Well, the paramount purpose of the grantors was evidently to provide for all the needs of these charities up to the limit of the trust funds, the income

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received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum, that is given to the family. The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is so to give the property in substance to the family, and that therefore it is invalid as a deed of wakf is, their Lordships think, entirely unsound.

It is next urged on behalf of the appellant that, inasmuch as no particular sum is named which the trustees are required to spend on any or on all of the charitable objects mentioned in the deed, they may spend on them as much or as little as they please, may, if they feel inclined, in fact, starve these charitable trusts, and that therefore the provision for charities is illusory. Well, their Lordships cannot at all take that view of the powers and duties of the trustees. As far as the *jateha* is concerned, it is to be the "customary" ceremony that the trustees are to perform without fail. Part of that ceremony is to feed the poor.

The trustees are, in their Lordships' view, at the least bound, so far as the funds under their control will permit, to make such provisions for the other charities as in the circumstances of the case a pious and charitable Mahomedan would consider reasonable and proper; and it is not disputed that, if the trustees failed to perform their trust, the Advocate-General, or some other authority having control over the administration of charities, could in a Court of law compel them to do their duty and secure the due administration of the trust fund.

The sum devoted to these charities is according to any standard not large, though for the present it is abundant for their needs. Having regard to the wealth of the grantors at the date of the deed the provision made by it is a modest provision. Their Lordships take the view that, having regard to all the circumstances of the case, the dominating purpose and intention of the grantors in executing this deed evidently was to provide adequately for these charities. That was their main and paramount object. The secondary and subsidiary object was to secure for their families and descendants any surplus that might remain over after the needs of the charities had been satisfied. As the gift for the charities was perpetual, it was necessary and right that the provision for capturing any possible residue should also be perpetual. The provisions of the deed carry out these objects, and that being so, it is, in their Lordships' view, only right to hold that the effect of the instrument is not to give the trust property in substance to the

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family of the grantors, but to give it in substance to the charitable purposes named in it. If this be so, as they think it is, the deed is within the authorities a good and valid deed of wakf and must be allowed to take effect according to its tenor. The appeal therefore fails and must be dismissed, and their Lordships will advise His Majesty accordingly. The appellant must pay the costs.

Douglas Grant :—Attorney for the Appellants.

Chapman, Walker and Shephard :—Solicitors for the Respondents.

J. M. P. *Appeal dismissed.*

PRESENT: *The Lord Chancellor (Lord Buckmaster), Lord Shaw, Lord Wrenbury and Mr. Ameer Ali.*

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November, 13, 14.

DANIEL THOMAS KEYMER

v.

P. VISWANATHAM REDDI.

[ON APPEAL FROM THE HIGH COURT AT MADRAS].

Suit on foreign judgment—Judgment on the merits of the case—Foreign judgment in favour of plaintiff on defendant's omitting to answer interrogatories—Code of Civil Procedure (Act V of 1908), S. 13 (b).

Section 13 (*b*) of the Code of Civil Procedure, refers to those cases where for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court.

A plaintiff in an action in England was given liberty to exhibit, and accordingly exhibited, interrogatories calling upon the defendant, who had delivered his defence to speak as to some of the material matters in dispute between them. The defendant omitted to answer the interrogatories and thereupon the plaintiff applied that the defence might be struck out and judgment entered for him, and judgment was accordingly given. Upon that judgment the plaintiff then sued the defendant in Madras :

Held, that the said judgment was not a judgment "given on the merits of the case" within the meaning of section 13 (*b*) of the Code of Civil Procedure, and that the suit could not be maintained.

Peruri Viswanathan Reddi v. *D. T. Keymer* (1) affirmed.

Appeal from a decree of the Madras High Court, dated November 6, 1914, reversing a decree of Bakewell J., dated the 8th September, 1914.

(1) (1914) I. L. R. 39 Mad. 95.

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The facts of the case are sufficiently set out in their Lordships' judgment. Plaintiff sued in Madras upon a judgment obtained in the Kings Bench Division of the High Court in England and his suit was decreed by Bakewell J., but on appeal dismissed by the appellate Bench of the Madras High Court (Wallis C. J., and Seshagiri Aiyar, J.) on the ground that the judgment was not a decision on the merits of the case.

For a report see *Peruri Biswanathan Reddi* v. *D. T. Keymer* (1).

Hence this appeal.

Sir R. Finlay, *K. C.*, and *Dunne*, for the Appellant: The trial Judge has rightly held that the suit was decided on the merits. "Judgment on the merits" means "Judgment on the facts in contention between the parties." The "merits of the case" are the facts that compose the issue on the principal question in the case. That question here was whether the defendant owed certain money. In a similar case in the Punjab, when defendant was served with a writ of summons issued by the High Court in England and failed to enter an appearance, the judgment passed against him was held to be a judgment on the merits: *Ram Chand* v. *Bartlett* (2).

[*The Lord Chancellor*: That is not the same as holdings on the facts. If a man's case is dismissed because he is in contempt that is not a decision on the merits.]

That would be a punishment but here, on the authority of the statute, he is put in the same position as if he had not defended. There is no difference between the Courts holding that a defence is a sham defence and in their taking evidence and disbelieving it. Here defendant put in a defence but would not give the Court the materials for holding whether such defence was true.

[*The Lord Chancellor*: Take the case of a holder of a bill. Signature is denied by the defendant. Holder knows nothing of the signature. Defendant refuses to answer interrogatories on the point and his defence is struck out. How can you say there has been no adjudication on the merits?]

It is a matter of presumption. I say that a defendant whose defence is struck out is in the same position as a defendant who has made no defence at all. Reference was made to the following cases: *The Delta* (3); *The Challenge* (4); *Haigh* v. *Haigh* (5); *Faiden* v. *Richter* (6).

(1) (1914) I. L. R. 39 Mad. 95.
(2) (1909) 44 P. R. 263 (282). (3) (1876) 1 P. D. 393 (401).
(4) (1904) P. D. 41. (5) (1885) 31 Ch. D. 478.
(6) (1889) 23 Q. B. D. 124.

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Dunne followed: section 13 of the Code of Civil Procedure is part of the law of *res judicata* and places a foreign judgment on the same footing as others provided it is given "on" the merits." A judgment passed against a man who makes a defence but withdraws it is *ex parte*, but still it is on the merits: and if, as here, a man puts himself in a position when he is left without a defence, the adjudication is similarly on the merits. "Merits" here means "merits of the case before the Court at the time of adjudication".

[*Lord Wrenbury*: Every judgment is that.]

It is the merits of the case so far as presented to the Court.

Sir Robert Finlay, *K. C.*, asked leave to cite some further cases. This was allowed and he referred to *Harris* v. *Quine* (1); *In re Henderson*: *Nouvion* v. *Freeman* (2), and the same case on appeal to the House of Lords (3).

L. De Gruyther, *K. C.*, and *Kenworthy Brown*, for Respondents were not called on.

Their Lordships' judgment was delivered by

November, 14.

The Lord Chancellor —This case raises only a short question, but admittedly it is one of wide and general importance. It is for that reason that the Board departed from their usual course, and permitted Sir Robert Finlay to resume his argument after it had been concluded and his junior had addressed the Board. After having given full consideration to the arguments urged both by him and by his junior, the Board find themselves unable to accede to his contention.

The history of the case is this: The appellant was originally plaintiff in a suit brought by him in this country against the respondent. In that suit he claimed a sum of 425*l.* 17*s.* 2*d.*, which he said was due to him from the respondent in these circumstances: The plaintiff is an Indian merchant carrying on business in London. The defendant, he alleged, was a member of a certain firm of traders who traded in Madras. The plaintiff asserted that he had entered into an arrangement with the firm, of which the defendant was a member, under which the firm were to consign to him, the plaintiff, goods for sale in London; they were to be sold on a certain commission, this commission and expenses were to be deducted, and the net proceeds were to be remitted back to India. As against those proceeds, it was also arranged that the defendant should be at liberty to draw bills to the extent of 75 per cent. The plaintiff

(1) (1869) L. R. 4 Q. B. 653 (658). (2) (1887) 37 Ch. D. 244 C. A.
(3) (1889) 15 A. C. 1.

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asserted that bills were so drawn; that he accepted them, and that ultimately it was found that these bills exceeded the amount of the proceeds for which he was properly accountable by the sum of 425*l.* 17*s.* 2*d.*, and for that sum he brought his suit. His statement of claim set out these facts, and to that claim a defence was delivered by the respondent, who denied that he ever was a partner in the firm with whom, and with whom alone, it was asserted that the transaction had been made. He also denied in less explicit terms that there was any money due, or that the arrangements had been made under which the plaintiff asserted that his claim arose. Upon this defence being put in, the plaintiff applied for liberty to exhibit interrogatories. That liberty was granted, and interrogatories were exhibited calling upon the defendant to speak as to some of the material matters in dispute. Those interrogatories the defendant omitted to answer, and thereupon an application was made to the Court, asking that the defence might be struck out and judgment entered for the plaintiff in the action. That judgment was accordingly given on the 5th May, 1913, and it is in these terms: "It is ordered upon the application of the plaintiff that the defendant's defence herein be struck out, and that the defendant be placed in the same position as if he had not defended, and that the plaintiff be at liberty to sign judgment for 425*l.* 17*s.* 2*d*, the amount claimed herein, and his costs of this action to be taxed"; and then judgment goes for the 425*l.* 17*s.* 2*d.*

Upon that judgment the appellant sued the respondent in Madras. The respondent set up by way of defence the statement that the judgment between him and the plaintiff in the English Courts had not been a judgment given upon the merits of the action, and that consequently by virtue of section 13, sub-section (b), of the Indian Code of Civil Procedure, 1908, the action could not be maintained on the judgment alone in the Indian Courts, and that the merits would have to be investigated.

The question as to whether that defence is well established depends upon considering what are the terms of section 13 of the Code of Civil Procedure, and what is the meaning of the phrase there contained as to a judgment given "on the merits of the case." Section 13 begins by a general provision that foreign judgments shall be conclusive as between parties to the litigation. It is in these terms: "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title." But to that general provision there are

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certain definite exceptions, and one of them is as follows: "Except where such judgment has not been given on the merits of the case."

The whole question in the present appeal is whether, in the circumstances narrated, judgment was given on the 5th May, 1913, between the parties on the merits of the case. Now if the merits of the case are examined, there would appear to be, first, a denial that there was a partnership between the defendant and the firm with whom the plaintiff had entered into the arrangement; secondly, a denial that the arrangement had been made; and, thirdly, and a more general denial, that even if the arrangement had been made the circumstances upon which the plaintiff alleged that his right to the money arose had never transpired. No single one of those matters was ever considered or was ever the subject of adjudication at all. In point of fact what happened was that, because the defendant refused to answer the interrogatories which had been submitted to him, the merits of the case were never investigated and his defence was struck out. He was treated as though he had not defended, and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of section 13, sub-section *(b)*. It is quite plain that that sub-section must refer to some general class of case, and Sir Robert Finlay was asked to explain to what class of case in his view it did refer. In answer he pointed out to their Lordships that it would refer to a case where judgment had been given upon the question of the Statutes of Limitation, and he may be well founded in that view. But there must be other matters to which the sub-section refers, and in their Lordships' view it refers to those cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court.

In the circumstances that happened here, it is in their Lordships' view impossible to hold that the merits of this case were ever the subject of adjudication, and therefore they think that this appeal must fail. They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Reynolds & Son: Solicitors for the Appellant.

John Josselyn: Solicitor for the Respondent.

J. M. P. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

CIVIL.

1917.

January, 21.

1916.

December, 13, 14.

BROJENDRO KISSORE ROY CHOWDHURY

v.

THE HINDUSTHAN CO-OPERATIVE INSURANCE SOCIETY LTD.

Limitation—Limitation Act (IX of 1908), Sec. 20, Sch. I., Arts. 65, 115—Promissory note—Construction—Surety—Note payable on demand—Present debt—Surety's liability, when arises—Payment of interest by principal debtor, if keeps alive remedy against surety—'Fresh period of limitation'—'Guarantee'—Contract Act (IX of 1872), Sec. 128.

The contract of a principal debtor was on a promissory note to pay on demand with interest, and the second defendant signed an endorsement on the promissory note "Repayment guaranteed by me" :

Held, that this was a contract of guarantee by the second defendant.

In the case of a debt, as soon as the day of payment arises, the default of the principal debtor is complete, and the surety, apart from special stipulation is immediately liable to the full extent of his obligation without being entitled to notice. Either Art. 65 or Art. 115, Sch. I. of the Limitation Act is applicable to a suit against the surety.

A note payable on demand is a present debt and is due and payable at once without demand.

A payment of interest by the principal debtor made with the knowledge and consent of the surety and at his request but not on behalf of the surety, does not expend the period of limitation under section 20 of the Limitation Act, so far as the surety is concerned.

A payment by one person cannot keep alive the remedy against another unless the circumstances are such that payment by the one may be regarded as a payment for the other. There is nothing in the relation of principal and surety itself which makes payment by the principal binding as a payment by the surety.

The fresh period of limitation created under section 20 of the Limitation Act by the payment of interest by the principal debtor is only in respect of the debt upon which the interest was paid, viz., the debt of the principal debtor.

Though the liabilities of the debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct ; their debts are distinct for purposes of the application of section 20 of the Limitation Act.

Section 128 of the Indian Contract Act defines the measure of the liability and has no reference to the extinction of liability by operation of the statute of limitation.

Appeal by one of the Defendants.

Suit for recovery of money due on a promissory note.

* Appeal from Original Decree No. 19 of 1916, against the decree of Mr. Justice Chaudhuri, sitting on the Original Side, dated the 19th January, 1916.

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The material facts are stated in the judgment of Chaudhuri, J.

Chaudhuri, J.—This is a suit on a Promissory Note against defendant No. 1 as the principal debtor and No. 2 as surety. They were interested in a Bank at the time the note was made and the money was apparently borrowed for it. The promissory note was executed by defendant No. 1 on the 25th April 1911, on the back of which defendant No. 2 made an endorsement on the same date, guaranteeing repayment. The suit was instituted on the 12th November, 1914. The plaint alleges that on the 13th November 1911, defendant No. 1, with the privity and knowledge of defendant No. 2 and at his request, paid to the plaintiff corporation Rs. 200 on account of interest on the said note. Defendant No. 1 has not appeared, but defendant No. 2 denies the allegation and submits that the suit is barred by the statute of limitations.

The plaintiffs have proved payment of Rs. 200 as interest by the defendant No. 1 on the 13th November, 1911. They have further proved that the defendant No. 2 knew about such payment. It appears that the Medical Secretary and Treasurer of the plaintiff corporation was under the impression that defendant No. 1 has not paid any part of the principal and interest on the loan, and complained about it to defendant No. 2, saying that the society could not wait, but must sue. Defendant No. 2 thereupon told him, about the middle of December 1911 "Wait a little. I know defendant No. 1 has paid interest on this loan." The books were sent for and entry of a payment of Rs. 200 as interest, dated the 13th November 1911 was found, but it appeared against another loan, which had been taken by defendant No. 1. Defendant No. 2 thereupon said that he distinctly remembered being told by defendant No. 1 that he had paid Rs. 200 as interest on the loan guaranteed by him. He asked that the entry should be corrected and the correction was made in his presence. Thereafter defendant No. 1 came to the office of the plaintiff Society about the end of December 1911 and confirmed what defendant No. 2 had stated, adding that he had paid the amount as interest on the promissory note in suit, and that the office had made a mistake in crediting it against his other loan. The General Secretary of the Society says that shortly afterwards defendant No. 2, referring to this incident, "complained to him in a half jesting way, saying that the Society had tried to do him out of Rs. 200, but he had prevented it." In answer to his query "Is the matter all right now" defendant said "yes." The attorney for the Society has been examined. He said that the plaint was engrossed on the 20th March 1912 and was ready to be

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filed, but defendant No. 2's manager had a talk with him and the plaint was kept back in consequence. Defendant No. 2 had at one time been one of the Directors of the plaintiff Society and its Treasurer, and the plaintiff Society postponed filing the suit until it became absolutely necessary. Defendant No. 2 applied for postponement of the case on the ground of ill health, and as he was out of town, I was prepared to issue a commission for his examination, but the application was abandoned, and the defendant has, for purposes of this case, chosen not to challenge the evidence given, but submits that he is not affected by the payment of interest by the principal debtor, even if it be assumed that he consented to such payment and had knowledge of it. His counsel Mr. Remfry, who has very ably argued the case, has strongly relied upon the case of *Gopal Daji Sathe* v. *Gopal Bin Sonu Bait* (1). A large number of other cases was cited and I shall deal with some of them but before I do so, it is necessary in the view I take, to deal with the law relating to the liability of a surety as contained in the Contract Act. A contract of guarantee is defined for us in section 126, Contract Act thus :—"A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor,' and the person to whom the guarantee is given is called the 'creditor.' A guarantee may be either oral or written." The obligation of a surety is of an accessory character. It presupposes the existence of a liability incurred or about to be incurred by a third person. It follows from the accessory or collateral character of the obligation, that it is co-extensive with that of the principal debtor, unless otherwise provided by contract (section 128). There are various provisions dealing with the discharge of the surety, which I need not refer to, except section 135, which says that if the creditor promises to give time to the principal debtor, the surety is discharged, unless the surety assents to such contract, and section 137, that mere forbearance on the part of the creditor to sue the principal debtor, does not in the absence of any provision in the guarantee to the contrary, discharge the surety. In this case there was no promise to give time and, if anything, it is a case of forbearance to sue the principal debtor, and therefore the surety cannot be considered as discharged from his liability on that account. Section 126 makes his liability co-extensive with that of the principal debtor. This, I understand to mean, both as regards

(1) (1903) I. L. R. 28 Bom. 248.

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quantum and time. If the surety gets the benefit of a payment by the principal debtor, it is difficult to understand why he should not bear the burden of it, especially if by operation of the law such payment extends the time within which a suit may be instituted against the principal debtor. See the observation of Cotton L. J. in construing section 8 of the Real Property Limitation Act, 1874 (37 and 38 Vict. C. 57) in *In re Frisby* v. *Alison* (1). That the term "co-extensive" refers to time also, seems to have been the view of the learned Judges in *Gopal Daji Sathe* v. *Gopal Bin Sonu Bait* (2) as they say that section 126 must be read with the Limitation Act. Reason is against having one period of limitation for the principal debtor and another for the surety. It is to be noticed that the Limitation Act has no express provision as to suits against a surety—although articles 81 and 82 provide for suits by a surety against the principal debtor and a co-surety respectively—Art. 83 refers to "any other contract to indemnify." A contract of indemnity is separately defined in the Contract Act in section 124. It seems to me that having regard to section 128 of the Contract Act no special provision was made in the Limitation Act. Article 65 of the Limitati on Act may be construed to apply to the case of a surety and has, I find, been so interpreted and applied. See *Govardhana Doss* v. *Krishnaiya* (3). Article 65 lays down that the period of limitation runs "from the happening of the specified contingency," but what is it in the case of a surety? Is this the default of the principal or the surety's failure to pay? The surety's default is a default consequent upon the default of the principal debtor. The obligation of the principal to pay is upon his contract with the creditor, and the obligation of the surety arises upon the principal's default. This is a case on a promissory note payable on demand and Art. 73 which provides for three years from the date of the note, is clarly applicable to the principal debtor, but the surety's liability is not immediately on the promissory note. He had not executed it and is not in any sense a co-contractor with the principal. The principal debtor's contract and the surety's contract with the debtor are not the same. Article 57 or 59 do not appear to me to be applicable to the case of a surety. I entirely adopt the reasoning for so holding as given in *Govardhana Doss* v. *Krishnaiya* (3). The surety's liability is upon his guarantee, not upon the loan. In an on-demand promissory note the amount is no doubt immediately payable. It is a present debt and an immediate liability.

(1) (1889) 43 Ch. D. 116. (2) (1903) I. L. R. 28 Bom. 248.
(3) (1910) 21 M. L. J. 457.

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The Madras case says that so far as the surety is concerned his default is the "specified contingency" and must be considered as a present default also. But it seems to me that his liability follows the default of the principal debtor, and is consequent thereupon. It is not however necessary for me to rely upon too metaphysical a distinction in considering this matter. As I have said before, it seems to me equitable that if the surety gets the benefit of a payment by the principal debtor, he should bear the burden—if any—created by it—especially by operation of the law. It is usual for the principal, not the surety, to pay interest and it seems to me "contrary to the good sense and the common understanding of mankind that while he is doing so the statute should run in favour of the surety unless he makes a payment or gives an acknowledgment." I am quoting the words used by Fry L. J. in *In re Frisby* v. *Allison* (1), which I am not forgetting were used in construing section 8 of the English Statute of 1874. It does not seem to me that by giving effect to section 128 of the Contract Act the provisions of the Limitation Act are at all nullified, one of the grounds for the decision in *Gopal Daji Sathe* v. *Gopal Bin Sonu Bait* (2).

Section 20 of the Limitation Act runs thus:—

"When interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt, or by his agent duly authorised in this behalf a fresh period of limitation shall be computed from the time when the payment was made."

It has been held that the expression "person liable to pay the debt" includes more persons than the original debtor: See amongst others *Bradshaw* v. *Waddington* (3). Payment by such persons as are liable in law to pay the debt, gives a fresh period of limitation, not merely against the principal debtor, but for the recovery of the debt, from any person liable to pay it. See *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (4) and *Domi Lal Saha* v. *Roshan Dobay* (5). There is undoubtedly a distinction between a debt and liablity for a debt. In the case of principal and surety, it seems to me that there is one debt and two liabilities. No doubt if the definition to be found in Blackstone be adopted, namely that "in general whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other, a debt is then said to exist between these parties," the surety's liability may be described as his debt, but it strikes me as immaterial to consider whether the payment by the principal can be treated as

(1) (1889) 43 Ch D. 116.
(2) (1903) I. L. R. 28 Bom. 248.
(3) (1902) 2 Ch. 430.
(4) (1905) I. L. R. 32 Calc. 1077.
(5) (1906) I. L. R. 33 Calc. 1278.

payment by him as agent for the surety, as in my view the payment by the principal keeps the debt or liability alive.

Section 20 of the Limitation Act has to be read with section 21 for the meaning of the expression "agent duly authorised in this behalf." Section 21 exempts the operation of section 20 in the case of payment by one of several joint contractors, but I do not think that a surety in a case like this can be called a joint contractor. It is strange that the law as laid down in section 21 expressly exempts certain persons from liability, but does not include a surety, if it was intended to relieve him. I hold it was not so intended.

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Gopal Daji Sathe v. *Gopal Bin Sonu Bait* (1) answers the question "In the absence of any provision by the surety against the payment of interest by the debtor on his account, does payment of interest by the debtor within limitation give a fresh starting point for limitation against the surety also under section 20 of Act XV of 1877" in the negative. I have given my reason not being able to accept it. The present case however seems to me to be distinguishable. Here the payment was made with the knowledge and consent of the surety and the circumstances also tend to lead to the conclusion that it was paid at his request. Here the surety asked the creditor to give the principal a little more time. In fact the suit was not brought as originally contemplated, the plaintiffs waiting as long as they possibly could out of consideration for the surety, having regard to the conversations between his manager and the plaintiff's attorney. I hold in the circumstances and upon my interpretation of the law, that the suit is within time against both defendants. I find that *Gopal Daji's* case (1) has been followed in *Sawmi Aiyangar* v. *Lakshmi* (2), but no reasons are given therefor, except that the pleader had not attempted to argue that the exposition of the law in that case was not correct.

Parr's Banking Co. Ld. v. *Yates* (3) does not appear to me to throw much light on the question before me. In the facts of that case it was held that the cause of action on the guarantee arose as to each item of the account whether principal, interest commission, or other banking charge, as soon as that item became payable and was not paid, and consequently the statute of limitations began to run in favour of the defendant in respect of each item from the date thereof. *Cockrill* v. *Sparkes* (4) held that the letter in that case consenting to the creditor receiving dividend and agreeing that his doing so was not to prejudice the creditor's claim upon him for the same debt, was not an acknowledgment of the debt so as to take

(1) (1903) I. L. R. 28 Bom. 248. (2) (1910) 21 M. L. J. 455.
(3) (1898) 2 Q. B. 460. (4) (1863) 1 H. & C. 699.

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the case out of the statute of limitations, which is not pertinent to the point I have been discussing.

In *John Jackson, Administrator of Olive Jackson* v. *Woolley and Hannah his wife* (1), Campbell C. J. held that mere knowledge and consent of the surety did not vary the effect of the payment, and it is not here contended that it does. It was a case of passive consent.

Wolmershausen v. *Wolmershausen* (2) is a case on a joint and several promissory note by surety and principal in which it was held that the principle laid down in *Allison* v. *Frisby* (3) was not applicable.

Watson v. *Woodman* (4) was a case of liability after dissolution of partnership which I need not consider. Here the surety not only knew of the payment of interest, but asked the creditor to allow the debtor some more time. His case does not appear to me to have any merits and I am unable, in the view I have taken, to hold that he is entitled to benefit of the statute. There will be a decree for the amount claimed with interest at 6 per cent. Costs against defendant No. 1 on scale 1 and against defendant No. 2 scale 2.

Against this judgment, defendant No. 2 appealed.

Messrs. H. D. Bose & Remfry : for the Appellant.

Messrs. N. Sarkar & C. C. Ghose : for the Respondent.

C. A. V.

January, 21.

Sanderson, C. J.—This is an appeal by Brojendro Kissore Roy Chowdhury the second defendant against the judgment of Chaudhuri, J., whereby he held that the claim against the second defendant was not barred by the statute of limitations. The facts of the case are not in dispute and are fully set out in the learned Judge's judgment as follows :—

"This is a suit on a promissory note against defendant No. 1 as the principal debtor and No. 2 as surety. They were interested in a Bank at the time the note was made and the money was apparently borrowed for it. The promissory note was executed by defendant No. 1 on the 25th April 1911, on the back of which defendant No. 2 made an endorsement on the same date, guaranteeing repayment. The suit was instituted on the 12th November, 1914. The plaint alleges that on the 13th November 1911, defendant No. 1, with the privity and knowledge of defendant No. 2 and at his request, paid to the plaintiff Corporation Rs. 200 on account of interest on the said note. Defendant No. 1 has not appeared,

(1) (1858) 8 E. and B. 778; 27 L. J. Q. B. 181; reversed 8 E. and B. 784; 27 L. J. Q. B. 448; 112 R. R. 774.

(2) (1893) 62 L. T. 541. (3) (1889) 43 Ch. D. 116.

(4) (1875) L. R. 20 Eq. 721.

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but defendant No. 2 denies the allegation and submits that the suit is barred by the statute of limitations."

"The plaintiffs have proved payment of Rs. 200 as interest by the defendant No. 1 on the 13th November, 1911. They have further proved that the defendant No. 2 knew about such payment. It appears that the Medical Secretary and Treasurer of the plaintiff corporation was under the impression that defendant No. 1 had not paid any part of the principal and interest on the loan, and complained about it to defendant No. 2, saying that the society could not wait, but must sue. Defendant No. 2 thereupon told him, about the middle of December 1911, "wait a little. I know defendant No. 1 has paid interest on this loan." The books were sent for and entry of a payment of Rs. 200 as interest, dated the 13th November 1911, was found, but it appeared against another loan, which had been taken by defendant No. 1. Defendant No. 2 thereupon said that he distinctly remembered being told by defendant No. 1 that he had paid Rs. 200 as interest on the loan guaranteed by him. He asked that the entry should be corrected and the correction was made in his presence. Thereafter defendant No. 1 came to the office of the plaintiff society about the end of December 1911, and confirmed what defendant No. 2 had stated, adding that he had paid the amount as interest on the promissory note in suit, and that the office had made a mistake in crediting it against his other loan. The General Secretary of the Society says that shortly afterwards defendant No. 2, referring to this incident, complained to him in a half jesting way, saying that the Society had tried to do him out of Rs. 200, but he had presented it.' In answer to his querry "Is the matter all right now," defendant said "yes." The attorney for the Society has been examined. He said that the plaint was engrossed on the 20th March 1912, and was ready to be filed, but defendant No. 2's manager had a talk with him and the plaint was kept back in consequence. Defendant No. 2 had at one time been one of the directors of the plaintiff Society and its treasurer, and the plaintiff Society postponed filing the suit until it became absolutely necessary. Defendant No. 2 applied for postponement of the case on the ground of ill health, and, as he was out of town, I was prepared to issue a commission for his examination, but the application was abandoned, and the defendant has, for purposes of this case, chosen not to challenge the evidence given, but submits that he is not affected by the payment of interest by the principal debtor, even if it be assumed that he consented to such payment and had knowledge of it."

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The first question which arises is as to the correct meaning of the contract entered into by the defendant.

The contract of the principal debtor H. P. Ghose was on the promissory note to pay on demand the sum of Rs. 4,000 and interest at the rate of 9 per cent per annum, and the second defendant signed an endorsement on the promissory note "Repayment guaranteed by me." This, in my judgment, must be treated as a contract of guarantee by the second defendant, and it was not disputed that, in its interpretation, regard must be had to the terms of section 126 of the Contract Act of 1872.

The learned counsel for the respondent admitted that a demand upon the surety was not necessary under this contract, but argued that his liability did not arise until default was made by the principal debtor.

Having regard to the wording of the appellants' undertaking and section 126 of the Contract Act, in my judgment this is the correct interpretation, and the next question, therefore, to be considered is, when did default by the principal debtor occur.

The learned Counsel for the Respondent argued that, though it was not possible to specify the exact date of the principal debtor's default, the evidence in the case showed that it could not have been before the middle of December 1911, when the incident referred to in the learned Judge's statement of facts occurred.

In my judgment this contention should not be adopted.

The promissry note being payable on demand, there was a present debt, which was payable without any demand.

In *Norton* v. *Ellam* (1), the note was one payable with interest on demand, and the question was from what time the statute of limitations began to run, and at page 464 Baron Parke says "I entertain no doubt at all on this point. It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand; and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference,

(1) (1837) 2 M. & W. 461.

except that thereby the debt is continually increasing *de die in diem*. It is quite different from the case of a note payable at sight, because there, by the terms of the contract, it must be shewn before the action is brought."

This is the English law, and in my judgment it is the same here, and this is recognised by the provision in the statute of limitations, Article 73, which provides that in the case of a promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue, the period of limitation begins to run from the date of the note.

There is some evidence that originally the advance was intended to be for 2 or 3 days (see the letter of 25th April, 1911) and it is obvious that by the consent of the parties it was allowed to run on for much longer, but there was no qualification of the promise to pay on demand contained in the note.

The debt, therefore, of the principal debtor arose as soon as the advance was made and the promissory note was signed and the debtor was "in default" from the date of the promissory note.

Now it being admitted that a demand was not necessary to create the surety's liability, but that the surety was liable when default was made by the principal debtor, it follows in my judgment that in this case the liability of the surety on the guarantee accrued from the date of the promissory note.

In the case of a debt, as soon as the day of payment arises, the default of the principal debtor is complete, and the surety, *apart from special stipulation* is immediately liable to the full extent of his obligation without being entitled to notice, and the reason of the rule is, that it is the surety's duty to see that the principal pays his debt.

The next question is, what article of the Limitation Act applies to the case of the surety. In my judgment it must be either article 65 or article 115, and, for the purpose of this case, I do not think it matters which is applied. If 65 is applied, the period would run from the happening of the specified contingency, *viz.*, the default of the principal debtor, or, if 115 applies, the period would run from the time when the contract of guarantee was broken, *viz.*, the failure to repay the money on the default of the principal debtor.

In my judgment, therefore, unless the statute of limitations is prevented from running in the case of the surety by the payment made by the principal debtor on the 13th November, 1911, the suit, which was brought on the 12th November, 1914, is barred in the case of the defendant No. 2.

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The next question, therefore, is, whether by reason of such payment a fresh period of limitation is to be computed, as far as the surety is concerned, from the time when the payment was made.

This depends upon section 20 of the Limitation Act. The words of that section, so far as it applies to the present case, are "Where interest on a debt is before the expiration of the prescribed period paid as such by the person liable to pay the debt or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made."

Now although the payment of interest by the principal debtor on the 13th November, 1911 was undoubtedly made with the knowledge and consent of the surety, and it may be at his request, there is no evidence in my judgment that such payment was made on behalf of the surety. The point therefore to be considered is whether in consequence of the payment of the interest by the principal debtor, by itself, a fresh period of limitation is to be computed from the time of such payment in the case of the surety.

In England the principle on which the effect of the statute of limitations was held to be avoided by the payment of principal or interest is that such payment is an acknowledgment of the existence of the debt from which is implied a new promise to pay the residue or the principal as the case may be ; and therefore it is obvious that a payment by one person, unless the circumstances are such that it must be regarded as a payment for another, cannot keep alive the remedy against that other, and there would seem to be nothing in the relation of principal and surety itself which makes payment by the principal binding as a payment by the surety.

The question, however, is whether section 20 of the Limitation Act has extended and amplified the effect of the payment by the principal debtor so as to keep alive the remedy against the surety.

It was argued that the words of the statute are simply "a fresh period of limitation shall be computed from the time when the payment was made" and that the statute does not confine the fresh period to the case of the person by whom the payment was made, but that the words are quite general, and reliance was placed on the judgment of Maclean C. J. in *Domi Lal Sahu* v. *Roshan Dobay* (1), where he says as follows :—"It is contended that the section only creates a new period of limitation as against the person actually paying the money, and that as the respondent had purchased before this payment was made, the new period of limitation cannot take effect as against him. There is nothing in the language of the section

(1) (1906) I. L. R. 33 Calc. 1278 (1281).

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to support that view, and there is nothing to warrant us in introducing words into the section which would authorise that view. The words of the section are general and plain. When the Legislature intends that a fresh period of limitation is to operate as against certain persons only, it says so in distinct terms: See section 18 of the Act. There is nothing in the section to indicate that the extension is only to operate against the person making the payment."

The facts of that case differed materially from those existing in the present case and the judgment must be read having regard to the facts of the case, and being so read that case in my judgment does not cover the present case: In *Domi Lal* v. *Roshan Dobay* (1), there was only one debt in question, *viz.*, the mortgage debt, and inasmuch as the mortgagor had made payments to the mortgagee, it was held that such payments affected not only the mortgagor, but the respondent who was the purchaser of the equity of redemption and who of course claimed through the mortgagor.

In the present case there were in my judgment two debts, *viz.*, that of the principal debtor and that of the surety: See *Lindsell* v. *Phillips* (2). The same view was taken by Jenkins C. J. in *Gopal Daji* v. *Gopal Bin Sonu* (3).

In my judgment the fresh period of limitation created under section 20 by the payment of interest by the principal debtor can be only in respect of the debt upon which the interest was paid, *viz.*, the debt of the principal debtor. The fact that the interest was paid with the knowledge and consent of the surety and even at his request, makes no difference unless the circumstances could be said to render the payment one on behalf of the surety, and in this case they do not.

Reliance was placed upon section 128 of the Contract Act. The section is as follows:—"The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract."

It was argued that inasmuch as the period of limitation had been extended by the payment of interest in the case of the principal debtor, it was also extended in the case of the surety, and that "co-extensive" applied not only to "quantum" but also to "time."

In my judgment section 128, which is in the nature of an interpretation clause and is directed to defining the liability of a surety upon the terms of a contract of guarantee, was not intended to affect the application of the statute of limitation.

(1) (1906) I. L. R. 33 Calc. 1278.
(2) (1885) 30 Ch. D. 291 per Cotton L. J. at p. 295.
(3) (1903) I. L. R. 28 Bom. 251.

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In my judgment the appeal should be allowed and judgment should be entered for the second defendant with costs in this Court and the Court of first instance.

Mookerjee, J.—This is an appeal by the second defendant in a suit for recovery of money due on a promissory note executed by the first defendant on the 25th April, 1911. The note was in these terms:

"On demand I promise to pay the Hindusthan Co-operative Insurance Society Ltd. or order the sum of Rupees four thousand only together with interest thereon at the rate of nine per cent. per annum for value received."

Hemendra Prasad Ghose, on the back of the note, the second defendant wrote as follows: "Repayment guaranteed by me. B. K. Roy Chaudhuri."

On the 13th November 1911, the principal debtor paid Rs. 200 to the creditor on account of interest then due. The sum was at first credited by mistake to another transaction, but the error was rectified on the 14th December, 1911. On the 12th November, 1914, the plaintiff instituted the present suit against the principal debtor and the surety for recovery of principal and balance of interest due on the promissory note. The first defendant did not enter appearance. The second defendant pleaded the bar of limitation. Mr. Justice Chaudhuri has overruled this contention and has decreed the suit against both the defendants. On the present appeal by the surety, the objection has been reiterated that the claim against him is barred by limitation.

To determine the question in controversy, we have to ascertain which article of the first schedule to the Indian Limitation Act governs this case. The only articles which have any possible application are those numbered 65 and 115. Article 65 provides that a suit for compensation for breach of a promise to do anything at a specified time or upon the happening of a specified contingency must be instituted within three years from the date when the time specified arrives or the contingency happens. Article 115 provides that a suit for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for, must be instituted within three years from the date when the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or where the breach is continuing, when it ceases. There has been some divergence of judicial opinion upon the question, whether Art. 65 is applicable to a suit against a surety for recovery of money on his

contract of guarantee. Hill, J. in the case of *Srinath Roy* v. *Peary Mohan Mookerjee* (1) held that the article was applicable; the Court of appeal (Petheram, C. J., Prinsep and Pigot, JJ.), on the other hand, ruled that Art. 115 and not Art. 65 was applicable. The point, however, was really immaterial in the circumstances of that case, as the claim against the surety was bound to fail whether the one article or the other was applied. It may be mentioned that the recent case of *Dwarka Doss* v. *Chirakala* (2) is an authority for the proposition that Art. 65 governs a suit of this description. For the purposes of the present case, it is not necessary to make a choice between Art. 65 and Art. 115, because whichever article is applied, the time is found to run in favour of the surety from the same date, and the period applicable is also the same in both cases. Under Art. 65, we have to determine the "specific time" at which the surety promised to pay; under Art. 115, we have to determine the time when there was a breach of contract on the part of the surety. Consequently, from either point of view, the question is, what was the precise nature of the guarantee embodied in the expression "repayment guaranteed by me."

Section 126 of the Indian Contract Act defines a contract of guarantee as a contract to perform the promise or discharge the liability of a third person in case of his default. The question accordingly arises, when was the principal debtor in this case in "default." Under the law of England, it is well-settled that a note payable on demand is a present debt and is due and payable at once without demand. In *Norton* v. *Ellam* (3), Baron Parke observed that the debt which constitutes the cause of action arises instantly on the loan, so that the contract on the note is in a state of being broken perpetually if the party does not pay it. Baron Alderson added that the cases which have decided that the bringing the action is a demand show that there has been a previous breach. It follows that on a note payable with interest on demand, the statute of limitations begins to run from the date of the note. To the same effect is the observation of Bayley, J. in *Rowe* v. *Young* (4): "If a man make a note payable on demand, it is settled by law that a special demand need not be stated in the declaration nor proved upon the trial." In *Maltby* v. *Murrells* (5), Baron Channell

(1) (1896) 25 C. L. J. 91.
(2) (1910) 21 M. L. J. 457.
(3) (1837) 2 M. & W. 461; 46 R. R. 646.
(4) (1820) 2 Brod & Bing. 165 (232).
(5) (1860) 5 H. & N. 813 (823).

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emphasised this by the observation: "No demand is necessary before bringing an action upon such a note—its payment is a duty which attaches the moment the note is made." See also *Re George* (1). This principle finds recognition in Art. 73 of the Indian Limitation Act, which provides that the time for the institution of a suit on a promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue, runs from the date of the note. [See also *Perumal* v. *Alagirisami* (2), where the correct conclusion is based on the doubtful ground that the words "on demand" must be regarded as a technical expression equivalent to "immediately" or "forthwith."] From this point of view, it is obvious that in the present case the liability of the surety accrued on the execution of the note by the principal debtor, and, consequently, as between the surety and the creditor, the statute of limitations commenced to run in favour of the surety from the date of the promissory note when he became liable to repay to the creditor the sum advanced. This conclusion is in conformity with the principle deducible from the cases of *Holl* v. *Hadley* (3) and *Colvin* v. *Buckle* (4). It necessarily follows that the claim against the surety is *prima facie* barred by limitation under Art. 65 or Art. 115, unless one or other of the provisons comprised in Part III of the Indian Limitation Act is applicable. The only provision on which reliance has been placed, on behalf of the plaintiff, to save the claim from the bar of limitation, is that contained in section 20.

Section 20 (1) of the Indian Limitation Act—we quote only so much thereof as has any possible application to the case before us—is in these terms: "Where interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made." This must be read subject to the provisions of section 21 (2), which lays down that nothing in section 20 renders one of several joint contractors chargeable by reason only of a payment made by any other or others of them; this section apparently indicates the only cases in which and the conditions under which the legislature allows the running of the period as against one person to be affected by the acts of another person and the case of principal debtor and surety is not expressly or impliedly included in the section [see the observations

(1) (1890) 44 Ch. D. 627. (2) (1896) I. L. R. 20 Mad. 245 (248).
(3) (1835) 2 Ad. & El. 758.
(4) (1841) 8 M. & W. 680; 58 R. R. 834.

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of Westropp C. J. in *Hajarimal* v. *Krishnarav* (1)]. The plaintiff seeks to avail himself of the benefit of section 20 by proof that, in this case, the principal debtor did, on the 13th November 1911, before the expiration of the prescribed period for the institution of a suit by the creditor to recover the money, pay interest thereon, with the result that the creditor became thereupon entitled to a fresh period of limitation from the date of the payment. Stress has been laid upon the generality of the expression "fresh period of limitation shall be computed" as used in section 20 (1), and reference has been made in this connection to the observations of Maclean, C. J. in *Domi Lal* v. *Roshan* (2) [see also *Coope* v. *Creswell* (3)]. The argument of the plaintiff in substance is that the fresh period runs, not merely against the principal debtor who makes the payment but also against the surety; this view is sought to be fortified by the contrast between the phraseology of section 20 and section 18; in the latter case, the period is extended only as against the party guilty of the fraud. This contention seems at first sight well-founded, but, upon closer scrutiny, must be rejected as fallacious. It is plain that the expression "fresh period of limitation" has reference to the institution of a suit for recovery of the "debt" mentioned previously. The question thus arises, is the debt of the principal debtor identical with the debt of the surety. If there is only one debt, the view may well be maintained that payment of interest by the principal debtor keeps alive the remedy against him as also against the surety. But if the debts must be deemed distinct, the payment of interest by the principal debtor cannot, notwithstanding the generality of the language of the section, extend the period of limitation for the institution of a suit for recovery of the debt of the surety. In my opinion, the true view is that though the liabilities of the debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct; their debts are distinct for purposes of the application of section 20. This was the view adopted by Jenkins, C. J. in *Gopal Daji* v. *Gopal Bin Sonu* (4) and by Rahim J. in *Srinivasa* v. *Echammal* (5) and I accept the position as well-founded on principle: *Maddox* v. *Duncan* (6); *Ross* v. *Jones* (7). It may

(1) (1881) I. L. R. 5 Bom. 647 (652).
(2) (1906) I. L. R. 33 Calc. 1278 (1281).
(3) (1866) L. R. 2 Eq. 106 (118).
(4) (1903) I. L. R. 28 Bom. 248.
(5) (1910) 21 M. L. J. 455.
(6) (1898) 143 Mo. 613; 41 L. R. A. 581; 65 Am. St. Rep. 678.
(7) (1874) 22 Wallace 576.

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further be observed that the surety, under the terms of the contract, is either jointly or separately liable, along with the principal debtor; if the debts are deemed joint, section 21 (2) shows that payment by one of them (the debtor) does not extend the time as against the other; on the other hand, if the debts are deemed distinct, the same result follows upon a true construction of section 20 itself. Section 128 of the Indian Contract Act, which makes the liability of the surety co-extensive with that of the principal debtor, is of no assistance to the plaintiff, as it must be read along with the provisions of the Indian Limitation Act; it defines the measure of the liability, and has no reference to the extinction of liability by operation of the statute of limitations. It is plain that the view we take of the true effect of section 20 accords with the well-known principle which underlies the rule that the period of limitation is extended by part payment of principal or payment of interest. The true foundation of this doctrine is that any such payment is an acknowledgment of the existence of the debt, and from it the law raises an implication of a promise to pay the residue or the principal, as the case may be: *Morgan* v. *Rowlands* (1); *Green* v. *Humphreys* (2); *Re Boswell* (3). Consequently, it is fairly obvious that a payment by one person cannot keep alive the remedy against another [*Astbury* v. *Astbury* (4)], unless the circumstances are such that payment by the one may be regarded as a payment for the other. There is nothing in the relation of principal and surety itself which makes payment by the principal binding as a payment by the surety: *Cockrill* v. *Sparkes* (5); *Re Wolmershausen* (6); *Henton* v. *Paddison* (7). In the case before us, there is, besides, no evidence to show that the payment by the principal debtor was in any sense a payment by the surety. There is thus no room for application of the principle, which has sometimes been recognised, that payment of interest by the principal debtor, with the knowledge and consent of the surety, extends the period of limitation as to both *Nichols* v. *Porter* (8); *Deaton* v. *Deaton* (9); *Dwire* v. *Gentry* (10). Conversely, payment by the surety may not keep the debt alive as against the principal debtor: *Suja* v. *Pahlwan* (11); *Coleman* v.

(1) (1872) L. R. 7 Q. B. 493.
(2) (1884) 26 Ch. D. 474.
(3) (1906) 2 Ch. 359 (365).
(4) (1898) 2 Ch. 111 (118).
(5) (1863) 1 H. & C. 699; 130 R. R. 739.
(6) (1893) 62 L. T. 541.
(7) (1893) 68 L. T. 405.
(8) (1905) 181 Ind. 332; 103 N. E. 842.
(9) (1884) 109 Ill. App. 7.
(10) (1914) 95 Neb. 150; 145 N. W. 350.
(11) (1878) P. R. 30.

Forbes (1); *In re Seager* (2); *Gardner* v. *Brooke* (3). The case of *Hajarimal* v. *Krishnarav* (4); approved in *Krishtokishori* v. *Radha Romun* (5) shows that the remedy against the surety may continue, notwithstanding that the remedy against the principal debtor has become barred. The decisions in *Re Powers* (6); *Re Frisby* (7) and *Lewin* v. *Wilson* (8) are clearly distinguishable, as they are based on the assumption that a payment by one co-debtor prevents the statute from running against his co-debtor, a principle not recognised in section 21 of the Indian Limitation Act. I hold, accordingly, that, in this case, time commenced to run against the creditor in favour of the surety from the 24th April, 1911, that a fresh period of limitation did not become available to the creditor as against the surety by reason of the payment of interest by the principal debtor on the 13th November, 1911, and, that, consequently, the present suit instituted on the 12th November, 1914, is barred against the surety by Art. 65 or 115 of the Indian Limitation Act.

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On these grounds, I agree that this appeal must be allowed and the claim against the surety dismissed with costs throughout.

A. T. M. *Appeal allowed.*

(1) (1853) 22 Pa. St. 156; 60 Am. Dec. 75.
(2) (1857) 3 Jur. N. S. 481; 26 L. J. Ch. 809.
(3) (1897) 2 I. R. 6.
(4) (1881) I. L. R. 5 Bom. 647.
(5) (1885) I. L. R. 12 Calc. 330.
(6) (1885) 30 Ch. D. 291.
(7) (1889) 43 Ch. D. 106.
(8) (1886) 11 App. Cas. 639.

CRIMINAL REVISION.

Before Mr. Justice Teunon and Mr. Justice Beachcroft.

NOLINI KANTA LAHA AND OTHERS

v.

ANUKUL CHANDRA LAHA.*

CRIMINAL.

1917.

January, 11.

1916,

December, 6.

Criminal Procedure Code (Act V of 1898), Sec. 195, Sub-sec. (1) (c)—Indian Penal Code (Act XLV of 1860), Secs. 465, 467, 471—Document, forgery of—Fraudulent user thereof before a Registrar—Production of the document before a Magistrate in a subsequent proceeding—Prosecution for antecedent forgery and user before the Registrar—Sanction of the Magistrate, if necessary.

* Criminal Revision No. 1078 of 1916, and Miscellaneous No. 123 of 1916, for quashing the proceedings pending in the Court of S. B. Bose, Esq., Deputy Magistrate at Howrah.

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Nolini Kanta
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The accused were charged with fabrication of a certain document and the fraudulent use thereof before a Sub-Registrar for registration. The document was after registration produced before a Magistrate in the course of certain proceedings, pending before him, in which the accused were parties :

Held that, in order to prosecute the accused in respect of the antecedent forgery and the antecedent user before the Sub-Registrar, sanction of the Magistrate under section 195 (1) (*c*) of the Criminal Procedure Code was necessary, and in the absence of such a sanction the whole proceeding was liable to be quashed.

Teni Shah v. *Belaki Shah* (1) ; *Emperor* v. *Bhawani Das* (2) and *Re. K. Parameswaram Nambudri* (3) followed.

Noor Mahommad Cassum v. *Kaikhosru Maneckjee* (4) dissented from.

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Petitioners prayed that proceedings taken against them under sections 465, 467 and 471 of the Indian Penal Code might be quashed, or in the alternative might be stayed till the final decision of a title suit pending in a civil Court. The material facts will appear sufficiently from the judgment.

Babus Dasarathi Sanyal, Manmatha Nath Mukherjee and *Jyotish Chandra Hazra* for the Petitioners.

Babus Atulya Charan Basu, Bir Bhusan Dutt, and *Jagat Chandra Bose* for the Opposite Party.

Mr. Monier for the Crown.

C. A. V.

The judgment of the Court was as follows:

January, 11.

In this case it appears that proceedings under sections 465, 467 and 471 of the Indian Penal Code have been taken in the Court of the senior Deputy Magistrate of Howrah, against the petitioners. These proceedings are in respect of a deed of sale executed by one Neroda Moyi Dasi in favour of petitioner No. 1, Nolini Kanta Laha, though ostensibly in favour of petitioner No. 3 Fakir Chandra Chakraverty. The document bears date 11th September 1915, and was registered on the 26th October 1915, before the Sub-Registrar of Amta.

The complainant in the proceedings is one Anukul Chandra Laha, who holds a conveyance of the same plot of land purporting to have been executed by Niroda Moyi on the 10th October, 1915. This document was presented for registration to the Sub-Registrar of Howrah on the 25th of October and was ultimately registered under the order of the District Registrar, on the 2nd December, 1915.

(1) (1909) 14 C. W. N. 479.
(2) (1915) I. L. R. 38 All. 169.
(3) (1915) I. L. R. 39 Mad. 677.
(4) (1902) 4 Bom. L. R. 868.

The complainant's case is that the document in favour of Nolini Kanta and Fakir Chandra has been fraudulently antedated, and his complaint was made before the District Magistrate of Howrah as against the 1st, 3rd, 4th and 5th petitioners on the 12th July, 1916, and as against the 2nd petitioner on the 2nd August, 1916. Both complaints were transferred by the District Magistrate to the Deputy Magistrate for disposal.

The complaints, it may be observed were made after preliminary proceedings which continued before the Sub-Registrar of Amta, the District Registrar, and an enquiring officer, from the 28th of October, 1915, to the 29th of June, 1916. The offences charged are the alleged fabrication of the document on or about the 26th of October, 1915, and the fraudulent use thereof before the Sub-Registrar of Amta on that date.

Meanwhile on the 29th of January, 1916, proceedings under section 145 of the Criminal Procedure Code had been taken in the Court of the Sub-Divisional Magistrate of Uluberia against complainant Anukul as the 1st party and against the present petitioner Nolini and Fakir, as the 2nd party. These proceedings were disposed of by an Honorary Magistrate to whom they had been transferred on the 29th of March, 1916.

It may be next observed that on the 7th July 1916, *i.e.*, 4 days before the 1st complaint in the criminal Court and about a month before the 2nd, the petitioner Nolini brought a suit on the document in the Court of the 2nd Munsif at Amta. In this suit the complainant Anukul is the defendant and the essential question in that suit will be whether the document which is the subject of the present criminal proceedings is or is not a genuine document.

On behalf of the petitioner it is then contended before us, firstly, that in the proceedings before the Honorary Magistrate under section 145 Criminal Procedure Code to which the petitioners Nolini and Fakir were parties—the document now in question was "produced or given in evidence," and that therefore under the provisions of section 195 (1) (*c*) the absence of the said Magistrate's sanction is a bar to the criminal proceedings in respect of the antecedent forgery and the antecedent user before the Sub-Registrar of Amta. It is secondly contended that the institution of the civil suit in the Court of the 2nd Munsiff at Howrah, having preceded the complaint on which the criminal proceedings have been taken these proceedings should await the determination of that suit.

We have then first to ascertain whether the document was in fact "produced or given in evidence" in the course of the section 145

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proceedings. When these proceedings were pending the document it appears was on the record of a case instituted against the stamp-vendor Doyal Sen and on the 8th of March, the present petitioner Nolini Kanta Laha presented a petition to the Honorary Magistrate in which he prayed that the document should be called for and used in the section 145 proceedings. Thereupon on the 11th of March, the Honorary Magistrate called for this document and other documents on the ground that reference to them was essentially necessary and the document was accordingly transmitted to him by the Sub-Divisional Officer, Uluberia, on the 15th of March.

We next find that in the course of the argument the pleader for the 2nd party Nolini and Fakir made use of the document and that in his judgment the Honorary Magistrate refers to it though he refrains from expressing any opinion on its authenticity. On these facts we think that we ought to hold that in the proceedings in the Court of the Honorary Magistrate of Amta, the document was produced within the meaning of section 195 (1) (c). In support of this view we may refer to the cases of *Guru Charan Shaha* v. *Girija Sundari Dassi* (1), *Akhil Chandra De* v. *The Queen-Empress* (2), *Sew Bollok Singh* v. *Ramdhin Bania* (3), and *In re Gopal Sidheshvar* (4).

The question then is whether this production makes a sanction necessary before the petitioners Nolini and Fakir who were parties to the proceedings, under section 145 Cr. P. C. can be prosecuted in respect of the antecedent forgery and the antecedent user before the Sub-Registrar.

The crown contends that such sanction is necessary only when the offences charged have been committed by the persons accused as and when parties to the proceedings in which the production took place.

The language of section 195 (1) (c) is by no means clear and would seem to admit of either construction, but though the contention on behalf of the crown is supported by the case of *Noor Mahomad Cassum* v. *Kaikhosru Maneckjee* (5), we are of opinion that this is unduly to limit the scope of the sub-clause under consideration. The view urged on behalf of the petitioner has been taken in *Teni Shah* v. *Bolaki Shah* (6) and *Emperor* v. *Bhawani Das* (7) and is also supported by the course of reasoning followed in *Re K. Parameswaram Nambudri* (8). With these decisions we agree and

(1) (1902) I. L. R. 29 Calc. 887.
(2) (1895) I. L. R. 22 Calc. 1004.
(3) (1910) 14 C. W. N. 806..
(4) (1907) 9 Bom. L. R. 735.
(5) (1902) 4 Bom. L. R. 268.
(6) (1909) 14 C. W. N. 479.
(7) (1915) I. L. R. 38 All. 169.
(8) (1915) I. L. R. 39 Mad. 677.

in this view the prosecution of the principal petitioners Nolini and Fakir Chandra cannot proceed without sanction. The other three petitioners who are charged as accessories were not parties to the case under section 145 Criminal Procedure Code, but it is not desirable that proceedings should be taken piece-meal or against the abettors while there is still a bar to the prosecution of the principals.

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In this view it is unnecessary to discuss the second contention advanced on behalf of the petitioners.

For the reasons given, we quash the proceedings now taken against the petitioners Nolini and Fakir, and stay the proceedings against the remaining three petitioners until the bar to a prosecution of the principals has been removed.

A. N. R. C. *Rule made absolute.*

PRIVY COUNCIL.

PRESENT : *Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

DEONANDAN PRASHAD

v.

JANKI SINGH AND OTHERS.

P. C. 1916. *December, 7.*

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Government revenue—Reciprocal duty of co-sharers—Sale for arrears of revenue—Bengal Land Revenue Sales Act (Act XI of 1859)—Default of the mortgagee of a co-sharer—Purchase by defaulting mortgagee—Such purchase for the benefit of the mortgagor and his co-sharers—Purchaser's right to contribution—Duty of counsel in ex parte *cases.*

Due regard is to be had to the relative position of co-sharers in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as will ensure that a sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property.

Where in breach of the terms of the mortgage on a share in an estate owned by several co-sharers the mortgagee intentionally allowed the Government revenue to fall into arrear with a view to the whole of the property being put up for sale and bought by himself, and the property is sold for the recovery of arrears of

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revenue under Act XI of 1859 and bought by the mortgagee, *held*, that although the sale stands the mortgagee holds the property so purchased for the benefit of the mortgagor and his co-sharers subject to the mortgagee's right to contribution to the expenses properly incurred by him in the purchase of the property.

Where an appeal is heard *ex parte* it is the duty of counsel to bring to the notice of the Board adverse as well as favourable authorities.

Doorga Singh v. *Sheo Pershad Singh* (1) disapproved. *Faizar Rahman* v. *Maimuna Khatun* (2) referred to.

Ex parte appeal from a decree of the Calcutta High Court (Holmwood and Chatterjee JJ.), dated August 18, 1910, reversing a decree of the Additional Subordinate Judge of Monghyr, dated the 17th June, 1908.

The facts are sufficiently stated in their Lordships' judgment. Towzi No. 5298 of Zilla Monghyr was assessed to revenue at Rs. 256. A 4 anna *pattidar* opened a separate account: the 12 anna share remained *ijmali* (joint), of this 12 annas share 3 annas belonged to some of the plaintiffs (respondents) who mortgaged their share with possession to appellant, the latter covenanting to pay Rs. 51-8-0 for revenue, cesses &c. Towards the instalment of revenue due in June 1905, appellant paid Rs. 3-6-0 in excess. In paying later instalments the other co-sharers took advantage of this excess payment, so that nothing remained to the credit of the 12 anna share. Thereafter appellant paid Rs. 9 only instead of Rs. 12 towards the *kist* (instalment) of September 1906, and as a result the whole ijmali share was put up for sale and purchased by appellant much below its value.

In 1907 the mortgagors of the 3 annas and the remaining co-sharers in the 12 anna share brought the present suit to set aside the sale or in the alternative for a re-conveyance of the property; alleging that the sale was due to appellant's default and that it was brought about by his fraud. The Subordinate Judge held that there was no fraud on appellant's part, that all the notices required by law were duly served, and that the sale was good and valid. He dismissed the suit. On appeal the High Court (Holmwood and Chatterjee, JJ.) reversed his decision. They held that the other share-holders had no notice of the sale proceedings, and that the present appellant's position was such that he could not hold his purchase for his own benefit either as against his mortgagors or as against the remaining co-sharers. They further held that the sale and purchase were fraudulent, and that the appellant could not be allowed to retain "his ill-gotten bargain." They therefore ordered

(1) (1889) I. L. R. 16 Calc. 194. (2) (1913) 17 C. W. N. 1233.

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that on plaintiffs' paying into Court Rs. 425 (the amount of purchase-money) with interest at 6 per cent. from date of sale within three months, the defendant-purchaser should convey the property to them.

Hence this appeal.

De Gruyther, *K. C.*, (*B. Dube* with him) for the Appellant: The High Court could not find fraud against the appellant, as no particulars of fraud were pleaded. The use of general words imputing fraud is ineffectual: *Gunga Narain* v. *Tiluckram Chowdhry* (1). The sale was caused by the default not of defendants but of plaintiffs themselves. They were not entitled to utilise the Rs. 3-6-0 overpaid by defendant in June, 1905.

If credit be given to defendant for that amount, there was no default on his part in September 1906. The defendant has paid all the revenue which as usufructuary mortgagee he contracted to pay.

Even assuming that appellant as one of the co-owners intentionally defaulted, that would not constitute fraud. A co-sharer has no duty to pay his *quota* of the Government revenue for the purpose of protecting other co-sharers, and even if the sale be brought about by his default, this does not prevent his purchasing for himself: *Doorga Singh* v. *Sheo Pershad Singh* (2). Section 90 of the Indian Trusts Act (Act II of 1882), has no application, it only applies when a co-owner or mortgagee gains an advantage by availing himself of his position as such.

Every co-sharer ought to look after his own interest and there is nothing to prevent one co-sharer buying the property sold for default of payment by another; on the contrary, this is expressly permitted by section 53 of Act XI of 1859.

The Respondents did not appear.

Their Lordships' judgment was delivered by

December, 7.

Sir Lawrence Jenkins:—This suit relates to a 12-annas share of Mouzah Tikarampur, Pergunnah Monghyr, being Towzi No. 5298. The property was offered for sale in the Collectorate of Monghyr, for the recovery of arrears of revenue, under the provisions of Act XI of 1859 on the 25th March, 1907, and was bought for the defendant, Babu Deonandan Prashad, a minor, in the name of Bunwari Lal. Before the sale it belonged as to 9 annas to the plaintiffs 7 to 16, and as to the remaining 3 annas to the plaintiffs 17 to 20, subject to a usufructuary mortgage of these 3 annas for the benefit of Deonandan, and to transfers of parts to the plaintiffs 1 to 6.

The suit, which impugns the sale, failed in the Court of first

(1) (1888) L. R. 15 I. A. 119; I. L. R. 15 Calc. 533.
(2) (1889) I. L. R. 16 Calc. 194.

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instance, but on appeal the plaintiffs' claim was upheld, and a decree was passed on the 18th August, 1910, that Deonandan, through his certificated guardian, do convey the property to the plaintiffs.

From this decree Deonandan has preferred this appeal. At one time the property was part of a larger estate, but there was a separation of shares under Act XI of 1859, and thereby the 12-annas share now in suit became subject to a Government revenue of 192 rupees, payable in four annual instalments.

Though the liability to the Government was, and continued to be, joint, yet, as between themselves, it was distributed among the several co-owners in proportion to their respective shares. Thus the amount payable in respect of the 3-annas share was a fourth, that is to say, 9 rupees in June, 12 rupees in September, 12 rupees in January, and 15 rupees in March. The mortgage of the 3-annas share for the benefit of Deonandan was executed on the 23rd December, 1904, and it was thereby stipulated that the mortgagee should, by remaining in possession from 1312 F. up to the repayment to him of the entire debt thereby secured, collect and realise the rent of the mortgaged mouzah, estimated as not exceeding 150 rupees, and should pay out of it 51 rupees 8 annas into the Collectorate for revenue and other public demands.

In June 1905, 9 rupees became payable by the mortgagee, but 12 rupees 6 annas was paid. The reason of this excess payment does not appear. At the end of the four following instalments there were no arrears.

But of the instalment payable in September 1906, only 9 rupees instead of 12 rupees was paid on behalf of the mortgagee. As the other co-owners paid their several aliquot shares and no more, there was, after giving credit for advance payments from previous instalments, a balance still owing of 2 rupees 10 annas. This became in due course an arrear of revenue as defined by the Act, and it was to recover this arrear that the property was sold by the Collector.

The arrear, therefore, which occasioned the sale, was due to the insufficient payment made in respect of the 3-annas share, and none the less was this the result of the default of those interested in that share, because in June 1905 an excess payment of 3 rupees 6 annas had been made. This excess had long been absorbed, and had ceased to be an excess credit in the Towzi ledger. This, in effect, is the view expressed in the judgment under appeal, and it is made a basis of the High Court's decision in the plaintiffs' favour. The learned Judges as a further and distinct ground of decision

find that there was fraud, and the language used by the High Court, read literally, might be understood to attribute personal fraud to the minor, Deonandan. But, in view of his age, this can hardly have been intended. In any case their Lordships acquit him of any personal misconduct in relation to the default or sale. He was, however, represented by agents, and when the position created by them is regarded as a whole, it leads to the conclusion that the Government revenue was intentionally allowed by them to fall into arrear with a view to the property being put up for sale and bought on behalf of the minor. If this be the true view, as their Lordships hold, then, however free from personal blame the minor may have been, he cannot profit by his agents' deliberate default committed in breach of the terms of the mortgage. As against his mortgagor therefore, the mortgagee cannot be allowed to hold for himself the advantage gained by the default for which his agents were responsible. Nor, in their Lordships' opinion, can he be permitted to hold for himself this advantage to the prejudice of the co-owners. For this purpose the mortgagor and mortgagee may be identified; they together represented the 3-annas share, and theirs was the obligation to pay their quota of the revenue. Equally in relation to the co-owners was the default designed with a view to a subsequent sale and to a purchase on the minor's behalf, and the advantage gained by this scheme must, in like manner, be held for the benefit of the co-owners, who are not shown to have been aware of the default or sale, or to have disentitled themselves to this equitable relief. They had contributed their proper quota to this September instalment, and it cannot be supposed that had they known of the default or the peril to their interests they would have allowed a valuable property, worth, it is said, not less than 8,000 rupees, to be sold away for the failure to pay 2 rupees 10 annas.

In estimating the conduct of the parties it is not without significance that, while the co-owners of the other shares paid in full their contribution to the succeeding January instalment, nothing was paid on account of the 3-annas share.

Their Lordships have not overlooked the decision in *Doorga Singh* v. *Sheo Prashad Singh* (1), which lends support to the appellant's contention as against the co-owners; but it is apparent from the judgment under appeal that this decision has not stood unquestioned. And this also appears from the Judgment in *Faizar Rahman* v. *Maimuna Khatun* (2). This case was not cited in the course of the argument, as the respondents were not represented, but their

(1) (1889) I. L. R. 16 Calc. 194. (2) (1913) 17 C. W. N. 1233.

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Lordships wish it be distinctly understood that where an appeal is heard *ex parte* it is the duty of counsel to bring to the notice of the Board adverse as well as favourable authorities.

The decision in *Doorga Singh's* case (1) applied too lax a standard of reciprocal conduct in holding that fraud in its strictest sense, such fraud as would support a common law action of deceit, was the test by which to judge these transactions. It failed to pay due regard to the relative position of co-owners in respsct of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as would ensure that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. Here Deonandan, through his representatives, had a duty to perform, which was inconsistent with his becoming a purchaser of the property in the way he did, therefore his title cannot operate to the exclusion of the co-owners.

It is no answer to say that the Act contemplates a purchase by a sharer; the sale stands, but in the circumstances the transaction is in effect nothing more than payment of an arrear of revenue enuring for the benefit of all. But this gives a right to contribution, so that it must be a term of granting the plaintiff's equitable relief that they contribute to the expenses properly incurred by or for Deonandan in the purchase of the property.

The amount to be contributed has been fixed by the High Court's decree at 425 rupees with interest at 6 per cent. per annum within three months. As no exception has been taken to this, either by way of cross-appeal or otherwise, it may be accepted, but the time for payment must be fixed by the Subordinate Judge after notice to the parties. The declaration in the decree that the sale and purchase is invalid is misconceived as a description of the legal position, and in its place should be substituted a declaration that the property purchased must be held for the benefit of the plaintiffs and the first defendant according to their several interests at the date of the sale, subject to the repayment of 425 rupees, and interest on that sum at the rate of 6 per cent. per annum from the date of the sale, and there should be a direction for a conveyance as decreed by the High Court on payment of that amount on or before a date to be fixed by the Subordinate Judge. With this variation the decree of the High Court should, in their Lordships' opinion, be affirmed, and they will humbly advise His Majesty to this effect.

Watkins and Hunter:—Solicitors for the Appellants.

The Respondents did not appear.

J. M. P. *Decree varied.*

(1) (1889) I. L. R. 16 Calc. 194.

PRESENT: *The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.*

SASHI BHUSAN MISRA AND OTHERS

v.

RAJA JYOTI PRASHAD SINGH DEO AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

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November, 7. December, 8.

Land law in Bengal—Mineral rights—Presumption in favour of the zemindar's ownership—Talabi Brahmattar grant made prior to 1790—Effect of grant of tenure without grant of mineral rights.

When a grant is made by zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

Held, accordingly, that a Talabi Brahmattar grant of a date antecedent to 1790 of a mouzah did not carry with it the mineral rights in the soil.

Jyoti Prashad Singh v. *Lachipur Coal Company* (1) affirmed. *Hari Narayan Singh* v. *Sriram Chakravarti* (2) and *Durga Prasad Singh* v. *Braja Nath Bose* (3) followed.

Under the English law, the word 'grant' is strictly applicable to the conveyance at common law of remainders, reversions, and incorporeal hereditaments, which do not lie in livery, or of which livery could not be given. This meaning is not to be given when it is used in the Indian document.

Appeal from a judgment and decree of the High Court at Calcutta (July 11, 1911) reversing a judgment and decree of the Court of the Subordi nate Judge of Burdwan (May 16, 1906).

The only question in this appeal related to the mineral and underground rights of a village called Panchgachia. The suit giving rise to this appeal was brought by the first respondent against the appellants and the other respondents. The plaintiff by his plaint allèged that he was the proprietor and zemindar of the Pachete Estate of which mouzah Panchgachia was a part, that he was "entitled to all rights, surface and mineral" in the said mouzah, which, "is an ordinary *mal* village" standing in his *serishta* in the names of defendants 5 to 35, who were holding the village "in Jamai right," that the remaining defendants had obtained a mineral lease from defendants 5 to 35, but that the plaintiff had never parted with the said mineral rights and the defendants, or any of them, had no rights thereto. The plaintiff therefore prayed for a declaration

(1) (1911) 14 C. L. J. 361; I. L. R. 38 Calc. 845.
(2) (1910) 11 C. L. J. 653; L. R. 37 I. A. 136; I. L. R. 37 Calc. 723.
(3) (1911) 15 C. L. J. 461; L. R. 39 I. A. 133; I. L. R. 39 Calc. 695.

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that he was entitled to the mineral rights of the said mouzah and that the defendants had no rights thereto, and for possession of such rights, and for a perpetual injunction restraining the defendants from working the mines in the village.

The defendants' main contention was that before the time of the permanent settlement the plaintiff's predecessor had made a grant of the village in question as Talabi Brahmattar at a fixed rent (mogli) to their predecessors, and that all rights including the mineral rights in the village belonged to them and the plaintiff had no right therein except the right of demanding and receiving from them the fixed "mogli or rent in respect of the said mouzah."

The Subordinate Judge stated that "there is no evidence oral or documentary as to the nature of the original grant or the person by whom it was made or the person or persons in whose favour it was made"; and found that defendants 5 to 35 had a Talabi Brahmattar right in the mouza from the date of the permanent settlement at a fixed rent and exercised transferable and heritable rights in respect of their tenure. On these findings on the authority of *Sriram Chakravarti* v. *Hari Narain Singh* (1), he held that the plaintiff had no right to the minerals which belonged to the defendants tenure-holders, and dismissed the suit with costs.

On appeal the High Court (Coxe and Teunon JJ.) affirmed the finding of the Subordinate Judge that defendants 5 to 35 were permanent tenure-holders at fixed rent. But they said that they were not bound by the decision in *Sriram Chakravarti* v. *Hari Narain* (1), which was then under appeal to the Privy Council, and held that in the absence of all evidence of the terms of the Talabi Brahmattar grant the mineral rights in question must be regarded as the property of the zemindar plaintiff, and that the suit must be decreed with costs. For a report of the case see *Jyoti Prasad Singh* v. *Lachipur Coal Company* (2).

The defendants tenure-holders thereupon appealed to His Majesty in Council.

Dunne for the Appellants: The appellants are grantees of an old Mogli Brahmattar, which constitutes and imports a gift or grant to the Brahmins. It is not a tenancy of any kind. The basis of the tenure is by a grant or conveyance of the village.

(Mr. Ameer Ali: The Brahmattar grant was made before the permanent settlement during the time of the Moguls and the question is what is the character of that grant and what passes under it.)

(1) (1905) I. L. R. 33 Calc. 54; 3 C. L. J. 59.
(2) (1911) I. L. R. 38 Calc. 845; 14 C. L. J. 361.

The Courts in India have found that the appellants are tenure-holders paying a small rent and their tenure is permanent, hereditary and transferable. But there is no question of any tenure in the sense of a lease. The suit is based on the village being a *mal* village and the plaintiff says that the appellants are lessees. But both Courts have found that it is not a *mal* village.

(The Lord Chancellor : It is not a *mal* tenure. It is Talabi Brahmattar at a fixed rent, alienable and heritable. Is it in the form of a fee-farm grant ?).

It is a grant of the land itself, where there is a grant like this, there is no reversion in the zemindar, who has no right in the lands granted except to receive the rent : *Ranee Sonet Kooer* v. *Mirza Himmut Bahadur* (1).

(Mr. Ameer Ali : referred to *Sahebzadee Begum* v. *Mirza Himmut Bahadur* (2) for the previous history of the case cited.)

For the meaning of Brahmattar grant reference was made to Wilson's Glossary, Field's Introduction to Bengal Regulations, Glossary to the Fifth Report, Vol. 2. and Hunter's Statistical Abstract of Bengal, Vol, 17. pp. 322, 328 (mogoli) and 368 (Talabi). Reference was also made to Bengal Regulation 1 of 1793, preamble, sections 1 and 3, and *Nil Madhab Sikdar* v. *Narattam Sikdar* (3).

At the time of the grant the zemindar was the proprietor of the land in the village and possessed the minerals, which passed to the defendants with the grant made to them.

Previous decisions of the Board do not apply to the Talabi Brahmattar, which is a grant of all the rights of the grantor and as such carries with it the right to minerals : *Megh Lal Pandey* v. *Rajkumar Thakur* (4). In *Hari Narayan Singh* v. *Sriram Chakravarti* (5), the tenure was not permanent and the judgment proceeded on the footing that there was no permanent, transferable and heritable tenure. In *Durga Prasad Singh* v. *Braja Nath Bose* (6), there was service tenure. These cases therefore do not decide the point now raised. *Kunja Behari Seal* v. *Durga Prasad Singh* (7), and *Nowaghor Coal Company Ltd.* v. *Sashi Bhusan Roy* (8), follow *Harinarain* v. *Sriman* (5) and consequently are not authorities against the present contention. *Kali Das Ahiri* v. *Monmohini Dassee* (9) is the only case which decides that a permanent lease is liable to forfeiture

(1) (1876) L. R. 3 I. A. 92 ; I. L. R. 1 Calc. 391. (2) (1869) 12 W. R. 125.
(3) (1890) I. L. R. 17. Calc. 826. (4) (1906) I. L. R. 34 Calc. 358.
(5) (1910) L. R. 37 I. A. 136 ; I. L. R. 37 Calc. 723 ; 11 C. L. J. 653.
(6) (1911) L. R. 39 I. A. 133 ; I. L. R. 39 Calc. 696 ; 15 C. L. J. 461.
(7) (1914) I. L. R. 42 Calc. 346 ; 20 C. L. J. 304.
(8) (1914) 19 C. W. N. 375. (9) (1897) I. L. R. 24 Calc. 440.

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on the tenant's denial of the title of the landlord. But it is submitted that the question in this case whether the zemindar has any right other than that of demanding and receiving rent is as far as the Board is concerned, still *res integra.*

Sir Robert Finlay K. C., De Gruyther K. C., J. M. Parikh and *Arfan Ali*, for the plaintiff-respondent: The cases of *Harinarain* v. *Sriram* (1) and *Durgaprasad* v. *Braja Nath* (2), conclude the appeal. In the first of those cases the High Court had held, as it appears in *Sriram* v. *Harinarain* (3), that the tenure, which was there debottar, was permanent, hereditary and transferable, and on appeal to this Board it was contended that there was not sufficient evidence to establish that finding. The second point decided by the High Court was that where the tenure was permanent, heritable and transferable, the minerals passed to the tenure-holder, and it was contended before this Board that even if the tenure were such as was found by the High Court, the minerals still remained with the zemindar unless the tenure-holder could show that the zemindar had parted with the the rights thereto. The judgment of the Board in *Harinarain* v. *Sriram* (1) deals with both these points separately, and the latter part of the judgment clearly decides in favour of the second contention raised in that case. This is made quite clear by the judgment of the Board delivered by Lord Macnaghten in *Durga Prasad* v. *Braja Nath* (2). He was a party to the judgment in the previous case and what he says about it is quite authoritative; *Durga* v. *Braja* (2) reverses *Brojanath* v. *Durga* (4), and *Harinarain* v. *Sriram* (1) is followed in *Kunja* v. *Durga* (5), and *Nowaghar Coal Co. Ltd.* v. *Sashi Bhushan* (6) where the High Court has twice interpreted that decision of the Board as now contended.

Assuming that the appeal is not covered by those two decisions of the Board, it is submitted that the only persons with whom the permanent settlement was made were the actual proprietors of the land and those holding under them were lessees. The position of the zemindar before tne permanent settlement is quite immaterial. The relation between the plaintiff and the defendants is that of landlord and tenant. The tenancy must be agricultural or non-agricultural. In either case the minerals would not pass to the tenant: Bengal Tenancy Act, 1885, sections 4, 5, 6, 10, 11, 13, 19, 20, 65 and 73; and Transfer of Property Act, section 108 (5), which incorporates the law as to minerals as it stood before the passing of the Act.

(1) (1910) L. R. 37 I. A. 136; I. L. R. 37 Calc. 723; 11 C. L. J. 653.
(2) (1912) L. R. 39 I. A. 133; I. L. R. 39 Calc. 696; 15 C. L. J. 461.
(3) (1905) I. L. R. 34 Calc. 54.
(4) (1907) I. L. R. 34 Calc. 753.
(5) (1914) I. L. R. 42 Calc. 346.
(6) (1914) 19 C. W. N. 375.

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A permanent tenure is not a conveyance in fee simple : *Abhiram Goswami* v. *Shayama Charan Nandi* (1) where *Kally Das* v. *Monmohini* (2) is approved, and it is therefore submitted that the point that a permanent tenure-holder has all the rights of the proprietor subject to the payment of rent is not *res integra*.

In 1906 the predecessors of the defendants themselves considered that they were lessees and as such obtained a decree in a suit brought by them under section 55 of the Bengal Regulation 8 of 1793 against the predecessor of the plaintiff.

Dunne replied.

The judgment of their Lordships was delivered by

December, 8.

The Lord Chancellor :—The appellants in this case are the descendants and representatives of certain Brahmins to whom, at a date uncertain, but antecedent to 1790, the then Raja of Pachete made a mokurari grant of the village known as Mouzah Panchgachia; the question raised in this appeal is whether this grant carried with it the mineral rights in the soil.

In considering the question it is important to avoid giving to words used in connection with legal transactions in India the special and technical meaning that they possess in this country. According to our law, the word "grant" is strictly applicable to the conveyance at common law of remainders, reversions, and incorporeal hereditaments, which do not lie in livery, or of which livery could not be given. But in connection with the present dispute, the word has no such meaning, and it is important at the outset to bear this in mind.

The grant under which the appellants claim cannot be found, nor is there any copy in existence, nor any record of its literal contents. It is, however, admitted that the grant was a Talabi Brahmattar grant.

Such a grant is defined in Wilson's Glossary as "land granted rent free to Brahmins for their support and that of their descendants, probably as a reward for their sanctity of living or to enable them to devote themselves to religious duties and education."

If after the words "rent free" be added the words "or at a fixed rent," this statement may be accepted as an accurate description of the origin of the grant, but in itself it contains no definition of the characteristics of the tenure. It has, however, been found in the present case that the tenure of the lands in dispute is permanent and heritable, and confers upon the holder for the time being full rights of alienation; but even these findings, though they invest the

(1) (1909) L. R. 36 I. A. 146 (166). (2) (1897) I. L. R. 24 Calc. 440.

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tenure with attributes of absolute ownership, afford little assistance in determining what it was that the grant passed.

Now, by the permanent settlement of 1793, all the mineral rights were confirmed to the zemindars, and the first respondent to this appeal represents their interest in the estate. If such rights were already possessed and recognised at the date of the settlement this confirmation would hardly have been needed, and this suggests that up to that date the rights enjoyed and granted in the lands were not considered as including the minerals; if this were so, as the grant in question could have created no rights in the property which the grantor did not possess, no right to the minerals could have been conferred. However that may be, there is certainly nothing in the permanent settlement to which the appellants can turn in support of their contention. Indeed, apart from the evidence furnished from the Sarsikal Jumma, and the facts that have been stated as to the well recognised attributes of a Brahmattar grant, the appellants have been unable to furnish any evidence at all in support of the view that the grant conveyed the minerals; their case really depends upon the assumption that the character of the grant itself is sufficient to establish their claim.

This question has been the subject of much controversy in the Indian Courts, and the appellants can certainly point to some powerful and well-reasoned judgments in support of their view. But, in their Lordships' opinion, the matter has been set at rest by the decision of the Judicial Committee. In the case of *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* (1) a question arose as to the ownership of the minerals underlying a certain village called Petena which had been granted to an idol of whom the Goswamis were the priests. In that case, as in this, the grant was not forthcoming, but it was held in the High Court that the tenure of the Goswamis gave them permanent, heritable, and transferable rights and, upon this finding, the High Court decided that the minerals had passed under the original gift. Upon appeal to the Privy Council this judgment was questioned upon two grounds. First, that there was no evidence that the tenure carried with it permanent, heritable, and transferable rights; and secondly that, even if this contention were wrong, in the absence of express evidence that the creation of the tenure was accompanied with the grant of the minerals, the minerals did not pass. The Judicial Committee decided in favour of the appellants' contention, and the material part of the judgment is to be found on p. 145 of the report. The two points are there dealt

(1) (1910) L. R. 37 I. A. 136; I. L. R. 37 Calc. 723; 11 C. L. J. 653.

with, and upon the first, Lord Collins, in delivering the judgment of the Board, made this statement: "On this meagre foundation of fact the two Judges who constituted the High Court, have built up the theory that the Goswamis were tenure-holders having permanent, heritable, and transferable rights." He then proceeds to deal with the judgment of Mr. Justice Pargiter, who took the view that the creation of such a grant carried with it the mineral rights; and he expresses disagreement with this view of the law, stating that it appeared to ignore the distinction between the mere tenure-holder and the zemindar; the judgment concludes by saying that the zemindar must be presumed to be the owner of the ground rights in the absence of evidence that he ever parted with them. The counsel for the appellants has strongly urged that the whole of this judgment depends upon their Lordships' refusing to accept the view that the tenure in that case was permanent, transferable, and heritable, and that the judgment only applies to an estate lacking those qualities. Their Lordships realise that the judgment, in the absence of the argument, might be open to this construction; but, read in the light of the then appellants' contention, they think that the two passages referred to dealt with the two separate points which were raised by the appellants, and that the latter part of the judgment was really independent of the statement which expressed dissatisfaction with the conclusion drawn as to the character of the tenure. Their Lordships would have felt more uncertainty about this view had it not been for a second judgment in a subsequent case: *Raja Sri Sri Durga Prasad Singh* v. *Braja Nath Bose* (1).

In that case also the nature of the grant was not identical with that of the grant in the present case. It was the grant to the holders of an office—the office of Digwar, and it was permanent only in the sense that, so long as that office continued to be held by members of the same family, the rights created by the grant would be assured to the holders for the time being of the office. In that case the High Court followed the decision of the High Court in the former case, which had not then been reversed, and Lord Macnaghten, in giving the judgment reversing the High Court, referred to that fact in the following terms:—"The learned Judges on appeal seem to have been misled by a decision of the High Court in the case of *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* (2), which was afterwards reversed by this Board, and

(1) (1911) L. R. 39 I. A. 133; I. L. R. 39 Calc. 696; 15 C. L. J. 461.
(2) (1905) I. L. R. 33 Calc. 54 reversed in L. R. 37 I. A. 136; I. L. R. 37 Calc. 723.

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is reported in L. R. 37 Ind. App. 136. There certain persons, called Goswamis or Gossains, priests of the Hindu idol to which a certain village had been assigned on a permanent debottar tenure at a small annual rent, granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this tribunal that it must be presumed that the mineral rights remained in the zemindar in the absence of proof that he had parted with them." It is plain from this statement by Lord Macnaghten, who was one of the members of the Board in the former case, that the earlier decision was intended to apply to a permanent debottar tenure. In other words, that the doubt that was thrown in the former case as to the sufficiency of the evidence on which the tenure had been held to be permanent, heritable, and transferable, did not affect the main judgment in the case, which was based upon the hypothesis that these attributes of the tenure had been established.

These decisions, therefore, have laid down a principle, which applies to and concludes the present dispute. They establish that when a grant is made by a zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

It is admitted in the present instance that the only evidence that can be relied on arises from the characteristics of the tenure and the statement as to the object and purpose for which the grant was made as stated in Wilson's Glossary. For reasons that have already been given, this affords no evidence necessary for the purpose, and their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In conclusion their Lordships desire once more to call attention to the tedious protraction of Indian litigation. It can only be a misfortune that a dispute such as the present, which affects a matter so important as the right of mining—a right of great value for the development and prosperity of any country—should have been in abeyance for a period which, from the commencement of the present dispute until the day of hearing of this appeal, has exceeded twelve years.

Watkins and Hunter :—Solicitors for the Appellants.

E. Dalgado :—Solicitor for the first Respondent.

J. M. P. *Appeal dismissed.*

PRESENT: *Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

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SULAIMAN

v.

BIYATHTHUMMA AND OTHERS.

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS)

Practice—Document not sued on but produced as evidence—Document creating rights—Code of Civil Procedure, (Act XIV of 1882), Sec. 59.

Where a plaintiff produces a document as a piece of evidence, but does not sue on it and does not produce it in Court when the plaint is presented, nor does he deliver it or a copy thereof to be filed with the plaint as required by Sec. 59 of the Code of Civil Procedure, the Court should treat the document merely as evidence but not as creating rights.

Appeal from a decree of the Madras High Court (Wallis and Sankaran Nair JJ.) dated August 20, 1909, reversing a decree of the Subordinate Judge of South Canara, dated the 14th September, 1904.

The respondents sued the appellant and one Mammad alleging that they themselves found one branch and Mammad another branch of a single undivided Mopla tarwad, of which Mammad was the head: that Mammad was in his dotage and had alienated some of the tarwad properties to his son-in-law, the appellant Sulaiman: they sought to remove Mammad from the headship of the tarwad and to have the allenations declared void. The main defence was that Mammad belonged to a separate Tarwad altogether. The plaintiffs in proof of their allegation that the division was into branches only relied strongly on a *razinama* or compromise petition which was mentioned in but not filed with the plaint, which stated:

"The above family properties were held by the two branches separately. This arrangement was confirmed and the undivided status of the 2 branches declared by the *razinama* (compromise petition) filed in O. S. No. 8 of 1887 on the Sub-Court file. It was therein agreed further that besides the then ratified debts, no other debts should be incurred by the 1st defendant's (i.e., Mammad's) branch."

The Subordinate Judge dismissed the suit. He held that the plaintiffs and Mammad belonged to separate Tarwads and that Mammad was competent to effect the alienations impeached in the plaint. This decision was reversed by the High Court, on the ground that the alienations were contrary to the *razinama*, which represented the plaintiffs and Mammad as forming two branches.

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"It is quite clear" they observed, "as between these Tavazhis, neither could alienate their property, which must be left unalienated, to come without loss to the surviving Tavazhi after the disappearance of the other."

Hence this appeal.

Sir W. Garth for the Appellant: Upon the evidence the trial Judge was right in holding that the family was separate. The High Court was in error in making a new case for respondents. It was not plaintiffs' case that Mammad was incompetent to make the alienations by virtue of the terms of the compromise of 1887. The plaintiffs relied upon the *razinama* as evidence of jointness and not for anything more. If it had been suggested at the trial that the *razinama* barred Mammad's power of alienation we would have met that case by proper evidence. Further, if the compromise were used for the purpose of effecting rights of property it was inadmissible under sections 17 and 49 of the Registration Act. In any case, on a proper construction of the compromise petition the High Court's view was wrong.

Kenworthy Brown for Respondents: There was no complete separation between the parties, but merely a division of the family into Tavazhis, which term is used to designate a branch of a Tarwad in separate possession of a portion of the joint family property for convenience of enjoyment: *Kenath Puthun* v. *Narayan* (1); and Mayne's Hindu Law, p. 319, (8th ed.)

There was no proof that all the members consented to a complete partition. The High Court's construction of the compromise is correct. It did not require registration. It was a judicial proceeding and section 17 of the Indian Registration Act does not apply: *Bindesri* v. *Ganga Saran* (2).

Sir W. Garth replied.

The judgment of their Lordships was delivered by

November, 27.

Sir Lawrence Jenkins.—The plaintiffs and Mammad, the first defendant, who has died since the institution of this suit, were descendants from a common stock. It is the plaintiffs' case that they were members of an undivided Mopla Tarwad governed by Marumakkaththayam law, and that this Tarwad possessed considerable properties, including those in the suit. Mammad, it is alleged, was the senior and Karnavan of the whole Tarwad; and

(1) (1904) I. L. R. 28 Mad. 182 (189) F. B.
(2) (1897) L. R. 25 I. A. 9; I. L. R. 20 All. 171.

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it is charged that he dealt with Tarwad property in fraud of the plaintiffs, and improperly alienated portions of it to Sulaiman, the second defendant.

The plaintiffs accordingly pray by their plaint that the first defendant be deposed from the management of the plaint properties, or in the alternative that the plaintiffs' right thereto be declared free of any encumbrance made by the first defendant. They further seek a declaration that the alienations in favour of the second defendant specified in the plaint are invalid and not binding against the plaintiffs.

By way of defence it is denied that the plaintiffs and first defendant were members of an undivided Mopla Tarwad, or that the first defendant was the senior and Karnavan of the whole Tarwad. On the contrary, the allegation in the written statement is that the branch of the plaintiffs and of the first defendant with seven others, became divided as far back as 1837—38, and that each branch has been living separately and enjoying and dealing with the properties separately and independently of the other branches. The suit was heard in the Court of the Subordinate Judge of South Canara, and was dismissed on the 14th September, 1904.

On appeal this decree was reversed by the High Court of Madras on the 20th August, 1909, and it was declared that the alienations made by the first defendant in favour of the second defendant of certain specified properties were invalid and not binding against the plaintiffs. From this decree of the High Court the present appeal to his Majesty in Council has been preferred.

Though by the law which governs a Mopla Tarwad there cannot be a partition unless all the members consent, yet it is common ground that there has been a partition of the properties of the original Tarwad in this case. The point in dispute is as to the character and extent of this partition.

To understand the rival contentions regard must be had to the history and state of the family, and this is compendiously shown in the tabular statement appended to the plaint. Descent under the law by which this family is governed is always traced through the female line to a female ancestor. It will thus be seen that the three stocks to which descent is traced were three sisters who left descendants—Bavumma, Kunhi Kathiya, and Thaki. There were two other sisters, but they can be left out of consideration as they apparently left no issue. Bavumma left four descendants, and Thaki two; of Kunhi Kathiya's descendants only three left issue.

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It is with the line of Kunhi Kathiya alone that this litigation is concerned.

The plaintiffs' contention is that the partition which was effected was only between the three branches of Bavumma, Kunhi Kathiya, and Thaki, and that the allotment made to the nine branches tracing from the several descendants was not by way of complete partition, but was merely a division for convenience of enjoyment.

The case made by the defence is that there was a complete partition between the nine branches, and that thereby nine separate and independent shares were constituted.

The last view was affirmed by the Subordinate Judge, and no dissent from it is expressed by the High Court; on the contrary, such inference as is suggested by that Court's meagre and inconclusive judgment is that it accepted the finding of the Subordinate Judge on this point, for the course followed by the High Court seems to assume partition into nine shares. In these circumstances, it might be enough for their Lordships to say that they are not satisfied that the Subordinate Judge was wrong in his view of the status of the family; but as the evidence has been examined and discussed before them in considerable detail, they think it right to indicate briefly the reasons that have led them to the same conclusion as that of the Subordinate Judge.

In 1856 a suit was commenced by Kunhi Paththuma, a descendant of Kuttyacha, against Moidin and Hasnar, the nephew of Kunhammad, who respectively represented the lines of Pathe and Biyathu. In other words, it was a suit between the representatives of the three lines descended from the common ancestress, Kunhi Kathiya, one of the three sisters already mentioned. The suit is described as one to establish the plaintiffs' right in property "after the first defendant." It ended in a compromise in the terms set forth in a Razi Petition, Exhibit XLII, in this suit.

It runs as follows:—

"All the properties belonging to the plaintiff and defendants on the hereditary right and acquired from the time of Recha Baithan up to the time of Amanath were divided into nine shares, with the consent of all members of the family, in the presence of respectable men, in 1013 (1837—38), and two of those nine shares were allotted to Baithan and his nephew Sunna Baithan, the descendants of Thaki (female); four others were allotted to Bavumma's descendants, *viz.*, one to Kalandu, one to Assan, one to Moidin Kutti, and one to Alimasa; and three shares to the descendants of Kunhi Kiriya (Kadya), *viz.*, one to the first defendant, one to the

plaintiff's uncle Kunhi Hassan, and one to second defendant's uncle Kuttiamad—thus they were separately enjoying the nine shares and paying the assessment."

The importance of this statement can hardly be exaggerated; it confutes the plaintiffs' suggestion of a division into three Tarwads, followed by a subsequent incomplete sub-division into nine branches, merely for convenience of enjoyment; and it supports the defence contention that the division was not into three but into nine independent shares, and that the separation was complete.

It is true that for the purpose of arriving at the proper mode of division there is a reference to the three stocks of descent, Bavumma, Kunhi Kathiya, and Thaki, but this was so of necessity, and was merely an application of the rule that division for the purpose of partition is stirpital, though, as between the members of any one class, it is capital. Nor is the actual compromise effected without its significance. Moidin, it appears, was old and had no family members; he had executed a will in favour of the second defendant, and this will was set aside with the consent of the second defendant. He had also made gifts of certain properties to his children, who were not members of the family. By the compromise it is provided that, "excepting these, the remaining properties have been equally divided with details thereof by the first defendant between the second defendant and the plaintiff's son Sooppi, so that they may enjoy the same from generation to generation according to Aliyasanthana law, and as he has delivered possession of those properties to them, these two persons may enjoy those properties as owners, paying the assessment separately which first defendant has been paying." This arrangement manifestly proceeds on the basis of a complete division in interest. But the matter does not rest there: the history of the family and the conduct of the parties, with an exception, to which reference will later be made, was in accordance with such a division. There was separate residence, separate assessment, and separate management. The revenue proceedings, the statements in the vakalaths, the alienations of property are all suggestive of separation, and this is the view that has been taken in earlier litigation in which this issue has been involved.

No doubt the litigation of 1886 and 1887 in some measure helps the plaintiffs' contention, for those suits were brought on the allegation that the plaintiffs and the first defendant were members of an undivided family, and Kunhammad and Mammad were among the plaintiffs in one of these suits and Mammad in the other. But

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the allegation was challenged and no judicial pronouncement was made in its favour, for each suit ended in a dismissal and a compromise. The terms of the compromise are to be found in Exhibit LL. The plaintiffs place much reliance on this document, and the High Court's decision in their favour is apparently based on its provisions.

It has been urged that on its true construction Exhibit LL shows that the only complete separation was into three shares and not into nine, and special stress has been laid on the opening clause. But the document must be read as a whole, and so read its true meaning does not support the plaintiffs' view; in fact, the final provision appears to their Lordships to be conclusive to the contrary. Much has been made of the use of the word Tavazhi, and what is claimed to be its primary signification; but even the authority on which this claim is made shows that it is a word of equivocal meaning, and may fairly be used where the separation is complete. While, therefore, their Lordships recognise that the attitude of Kunhammad and Mammad in this litigation of 1886 and 1887 is worthy of consideration, it would be easy to attribute too much weight to it, and this they feel would be done if they allowed it to outweigh the clear statement in the compromise made in the suit of 1856, and the indirect evidence which from all sides converges to the conclusion that there was complete separation.

In fact, it may be fairly said that there are disclosed in the evidence all those incidents that would be present in the case of separation, and even after the compromise of 1887 there are dealings and conduct on the part of the plaintiffs which, in strictness, would only be consistent with the existence of two separate Tarwads in the sense for which the defence contends. In the light of these several matters, their Lordships see no reason to think that the Subordinate Judge erred when he elected to be guided by the documentary evidence rather than by the oral testimony of the witnesses.

It only now remains to deal briefly with the use to which Exhibit LL was put by the High Court. The judgment apparently treats the document not merely as evidence, but as creating rights. The view of its operation taken by the learned Judges was that the income of the properties in the possession of each branch was to be enjoyed by the members of that alone till the extinction of that branch; but that they had no right of alienation.

The objection to this, however, is that the plaintiffs did not sue on this document. They did not produce it in Court when the plaint was presented, nor did they deliver it or a copy thereof to be

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filed with the plaint, and yet this is what the Code of Civil Procedure § 59, directs as regards a document on which a plaintiff sues. Nor was the document treated otherwise than as a piece of evidence in the trial Court. And this is important, for had it been put forward by the plaintiff as creating rights then, apart from any difficulty as to its admissibility in the absence of registration—a point on which their Lordships express no opinion—it is manifest that a line of defence requiring evidence might have been adopted, which was unnecessary so long as the Razi petition was used merely as a piece of evidence.

Their Lordships therefore decline to deal with the Razi petition as a document which created a bar on Mammad's power of alienation, and they do this the more readily as it does not appear to them to bear the construction, or have the effect ascribed to it by the High Court.

The result, then, is that their Lordships hold that the suit was rightly dismissed by the Subordinate Judge, and they will therefore humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court set aside, and that of the Subordinate Judge restored with costs in both Courts, and that any costs paid under the decree of the High Court must be returned. The respondents must pay the costs of this appeal.

Douglas Grant : Attorney for the Appellant.

E. Dalgado : Solicitor for the Respondents.

J. M. P. *Appeal allowed.*

PRESENT : *Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

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December, 20

TRICOMDAS COOVERJI BHOJA

v.

SRI SRI GOPINATH JIU THAKUR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Limitation—Suits for rent based on a registered contract—Suit for mining royalties—Indian Limitation Act (Act IX of 1908), Sch. I, Arts. 110 and 116—Error in decree may be corrected by appellate Court as against a party appealing in favour of a party who has not appealed.

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Suits for rent (in this case mining royalties) based on a registered contract in writing are governed by Art. 116 and not by Art. 110 of Sch. 1 of the Indian Limitation Act.

Lalchand v. *Narayan* (1) affirmed. *Ram Narain* v. *Kamta Singh* (2) disapproved.

The trial Court made a decree against the first defendant partly in favour of the plaintiffs and partly in favour of the second defendant. First defendant alone appealed to the High Court which corrected the second part of the decree by awarding to the plaintiffs for the second defendant's benefit the amount awarded to him directly by the first Court. First defendant in this appeal contended that the High Court had no jurisdiction to do this :

Held, that as the first defendant had brought the decree before the High Court for review, they had power to make the decree they did.

Appeal from a decree of the Calcutta High Court (Chitty and Teunon JJ.) dated May 29, 1912, modifying a decree of the Additional Subordinate Judge of Burdwan, dated the 5th July, 1909.

The shebaits of an idol by a registered lease leased certain mining rights to appellant's father on the terms among others that he should pay certain commission or royalties on all coal &c. raised by him, and that if no coal were cut he should pay a minimum royalty of Rs. 4000 per annum. There were four shebaits : three of them in 1908 sued appellant for royalties due from 1901 onwards. They joined the other shebait as second defendant on the ground that he had refused to join as plaintiff.

The first defendant pleaded payment. The second defendant pleaded that he had received Rs. 4000 from first defendant and that he was entitled to get a joint decree with the plaintiff for his one-fourth share deducting this Rs. 4000.

The Subordinate Judge held on the evidence that the payment alleged by the first defendant was not made out. He decreed the suit and awarded defendant No. 2 the amount claimed by him.

Defendant No. 1 (the present appellant) appealed to the High Court, defendant No. 2 did not appeal. The High Court modified the decree by awarding to the plaintiffs for the benefit of defendant No. 2 the sum which the Subordinate Judge had awarded him direct. The contest before the High Court was mainly as to the fact of payment : Limitation was not raised in the grounds of appeal, and, was "not very strongly pressed" before the High Court, who held that they were concluded by authority.

Defendant No. 1 appealed to the Privy Council.

De Gruyther K. C., and *Dunne* for the Appellant. Except for 3 years before the suit the claim is barred. The suit is to recover

(1) (1913) I. L. R. 37 Bom. 656. (2) (1903) I. L. R. 26 All. 138.

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rent, and the article applicable is 110. The High Court were wrong in thinking Art. 116 applied: they relied on *Umesh Chunder Mundul* v. *Adarmoni Dasi* (1). That case has been dissented from in *Ram Narain* v. *Kamta Singh* (2).

(Lord Parker: Is the claim here for rent at all?).

I submit it is. For a definition of rent, vide, Encyclopoedia of English Law: "royalties" are defined in *Attorney-General of Ontario* v. *Mercer* (3).

Given an appropriate article, which applies, you must apply it and not go to a general article. Rent has a separate and distinct article to itself. Article 116 is for compensation for breach of contract. Rent is not such compensation. "Compensation" is not defined in the Limitation Act, and it is only by reading section 73 of the Indian Contract Act into it that article 116 can be made to cover the case. The real clue to article 116 is article 115. Article 110 is outside both article 115 and article 116.

Our second point is that defendant No. 2 could not recover without being made a plaintiff. The Sub-Judge gave him a decree against another defendant. The High Court recognised that this was wrong, and gave the plaintiffs a decree for the whole amount. This they could not do. The plaintiffs accepted their decree for $\frac{3}{4}$ths and the High Court had no power to give them more when there was no appeal before it as to the remaining $\frac{1}{4}$th.

Sir W. Garth for respondents: The Limitation Act does not in terms deal with an action for royalties. Such royalties may or may not be rent. The plea of limitation was not taken before the trial Court nor was any issue raised or decision given. The High Court were wrong in considering the point at all. Section 3 of the Limitation Act applies only to cases clear on the face of the plaint. If the defendant had taken the plea that the action was barred because the royalties were rent evidence could have been taken as to whether they were rent or not. The case was really fought on the question of payment, and the appellant cannot now raise limitation.

(The Board intimated that they did not wish to hear further argument on the question of limitation.)

There is no force in the other point. The plaintiffs originally claimed the whole amount. The decree was under the circumstances quite proper.

(1) (1887) I. L. R. 15 Calc. 221. (2) (1903) I. L. R. 26 All. 138.
(3) (1883) A. C. 767 (777).

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Their Lordships' judgment was delivered by

Lord Sumner:—In this case an idol, by his Paricharaks and shebaits, sued to recover mining royalties under a lease of his colliery property in Burdwan. The shebaits, who made the agreement in suit, were four brothers, and the property was the ijmali debottar property of their family deity. Owing to some quarrel the collection of rents was not always joint and, at the time when the principal defendant was making default in paying the royalties, one of the brothers obtained from him payment of 4,000 rupees on account of his share, on the terms that, if his co-sharers did not agree to give up their claim to interest and be content with like sums, he was to be paid by the principal defendant in the same proportion as the co-sharers might be paid. This brother was accordingly unwilling to join as a plaintiff in bringing the suit and so was joined as a second defendant. As such he appended to his defence a claim against the first defendant to recover *pari passu* with the plaintiffs, after giving credit for the 4,000 rupees already paid, in case they should make out their claim. This was, of course, quite irregular in point of pleading, and gives rise to a technical question of minor importance. The suit was begun more than three and less than six years after the cause of action accrued, and the main question is whether or not the whole claim is statute-barred.

The lease was effected by a mokurari kabuliyat and a pottah expressed in similar terms. The first defendant agreed that if he failed to cut any coal at all, he would pay a minimum royalty of 4,000 rupees per annum. It is certain that he cut no coal: whether or not he even entered or took possession is not so clear. The sum to be paid per maund of coal gotten is called "commission" and not "rent," but the right acquired by the principal defendant is described as a "settlement." The kabuliyat runs—

"On a proposal being made to take a settlement of the rights of your family deity in this mouzah for the purpose of raising coal from below the surface of the said mouzah by making pits, you, for the benefit of your family god, and with the object of increasing the income of the debottar property, are making a settlement with me of the right and interest in the said mouzah to the extent owned by your family deity."

Their Lordships accordingly take it, as seems to have been done by the Courts below, that the minimum royalty sued for would be "rent" within article 110 of Act XV of 1877, which is the enactment applicable.

The *kabuliyat* sued on was a registered instrument and the question is whether the suit is one for arrears of rent, as the appellant lessee says, and so is barred by article 110, or whether, as the respondent lessors contend, it falls within article 116 as a suit for "compensation for breach of contract in writing registered," and thus was brought within time. The argument for the appellant is that the suit being for arrears of "rent" is in terms within article 110 and is not, truly speaking, a suit for compensation for breach of contract at all, since the lessee does not covenant to get coal but is at liberty, on paying the agreed minimum royalty, to let the coal alone, and commits no breach of contract if he chooses to do so.

The Limitation Act No. XIV of 1859 provided that the period of limitation applicable to "all suits for the rents of any buildings or lands" should be three years (section 8); the period applicable to suits brought "for the breach of any contract" three years, unless in the case of a contract which could have been registered such registration had taken place within six months from the date of the contract (section 10); and, *thirdly*, that the period applicable "to all suits for which no other limitation is herein expressly provided" should be six years. Act IX of 1871 repeals the Act of 1859, and adopts the present framework of a schedule subdivided into articles and columns. Schedule 2, Part VI, the part which comprises the cases to which the period applicable is three years, includes article 110 "for arrears of rent" the article 115 "for the breach of any contract, express or implied, not in writing registered and not herein specially provided for." Part VII, which included the cases to which the period applicable was to be six years, contained article 117—"on a promise or contract in writing registered." This Act in turn was repealed by Act XV of 1877, which re-enacted article 110 in the same terms, and article 115 almost in the same terms, *viz.*, "for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for," and in Part VII substituted article 116 for article 117, thus, "for compensation for the breach of a contract in writing registered."

Both these Acts draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case "compensation for the breach of a contract" points rather to a claim for unliqui-

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dated damages than to a claim for payment of a sum certain. On the other it has been pointed out that "compensation" is used in the Indian Contract Act in a very wide sense, and that the omission from article 116 of the words, which occur in article 115, "and not herein specially provided for," is critical. Article 116 is such a special provision, and is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds. They begin in 1880, and are to be found in all the Indian High Courts. In spite of some doubts once only was it held, in 1903 [*Ram Narain's case* (1)], that in such a suit article 110 and not article 116 applied. Then in 1908, and in this state of the decisions, Act IX of 1908 replaced the Limitation Act of 1877 without altering the language or arrangement of the articles, and in 1913 in *Lalchand* v. *Narayan* (2), the High Court of Bombay held that, especially in view of this re-enactment, the current of decisions must be followed, and *Ram Narain's case* (1) must be disapproved. In the present case the High Court treated the matter as settled law in the same sense.

Where the terms of a statute or ordinance are clear their Lordships have decided that even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the meaning of the enactment : *Pate* v. *Pate* (3). Such is not the case here. However arguable the construction of Act XV of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction, for which the appellants argue, was ever clearly right. On the contrary, their Lordships accept the interpretation so often and so long put upon the statute by the Courts in India, and think that the decisions cannot now be disturbed.

The question of limitation was not discussed at the trial. The principal defendant pleaded payment, made it his main case, failed in it, and now acquiesces in his failure. The decree passed was for royalties up to a certain amount, and was in favour of the plaintiffs for three-fourths and of the second defendant for one-fourth, less credit for the sum admittedly received by him on account. In form this decree was erroneous, and this was admitted in the High Court. The point was doubtless not brought to the attention of the trial Judge ; otherwise the proceedings could readily have been put in proper form, all the more because the

(1) (1903) I. L. R. 26 All. 138. (2) (1913) I. L. R. 37 Bom. 656.
(3) (1915) A. C. 1100.

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second defendant, though concluding his defence with a claim for a decree against his co-defendant, had previously pleaded that he was entitled to part of the entire arrears of royalties, the subject of the plaintiffs' claim, and had prayed "that this suit may be ordered to be prosecuted upon making this defendant a plaintiff." The High Court corrected the admitted error by making a decree for the entire amount in favour of the plaintiffs, and declaring that, as to a named part, it was for their share and as to the residue it was for the second defendants' share. The principal defendant by this appeal had brought the entire decree before the High Court, disputing it *in toto*. It was one decree, not two. The second defendant had not appealed. The now appellant argues that, for want of a separate appeal by the second defendant, the High Court had no jurisdiction to award to the plaintiffs for his benefit the sum which had been awarded to him directly by the trial Judge. It was said that, as the second defendant, by not appealing, stood by the decree as made below, and as in that form it was wrong, he must lose his right altogether. It would be unjust if this were so. Nevertheless, if the appellant could have shown any provision of the Civil Procedure Code, or of any other enactment, which showed clearly that the High Court had no such power, the objection must have prevailed. No such provision was cited. The appellant himself had brought the entire decree of the trial Judge before the High Court for review, and thus they were right in making the decree, which should have been made below, even though the second defendant had given no notice of appeal.

A point was also made that as to the royalty for one *kist* the claim was in any case statute-barred and that the amount of the decree should be reduced accordingly. Their Lordships think that this point is not open to the appellant. There is no trace of its having been raised before either Court below. It does not appear in either the notice of appeal to the High Court or in the grounds for applying for leave to appeal to their Lordships' Board. If it is raised at all by the appellant, in the reasons appended to his case, it is raised only obscurely. It depends on the construction of the *kabuliyat* in a respect not submitted to either Court below, and their Lordships decline to entertain it.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Watkins and Hunter: Solicitors for the Appellant.

Theodore Bell & Co.: Solicitors for the Respondents.

J. M. P. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

CIVIL.

1917.

January, 18.

1916.

December, 5, 6, 12, 13.

SHAIK NAWAB JAN AND OTHERS

v.

SAFIUR RAHMAN AND OTHERS.*

Hiba—Musha—Gift by father to adult and minor sons—Possession, change of—Natural guardian, if can divest of his guardianship in favour of another—Hiba-bil-ewaz—Consideration—Burden of proof.

Per Curiam: Where there was a gift in favour of an adult and an infant son of immovable property, the infant being in the donor's guardianship, possession delivered to the adult donee and the donor assumed to take seisin of the minor's share, the gift is not invalid on the ground of *musha*.

Mumtaz v. *Zubaida* (1) referred to.

Per Sanderson, C. J.: The father is the natural guardian of the minor son; but under the circumstances of the case, *viz.*, that the father was advanced in years, and did not expect to live long, and, desiring to prevent ill-feeling and disputes amongst his children and wives, the father was held to divest himself of the right and duty of guardianship over his minor son and could appoint any other person as guardian.

Per Mookerjee, J.: Where a gift is made by a father to his infant son, no change of possession is necessary; the principle is that the declaration of gift is deemed to change the possession by the father on his own account into possession as guardian on his son's account and the law is the same in every other case where the donee is a minor in lawful custody of the donor.

The burden of proof lies on the person in whose favour a hiba-bil-ewaz is executed to establish that the consideration was paid as described in the instrument.

Appeal by the Plaintiffs.

Suit for declaration of title to property.

The material facts are stated in the judgment of Greaves J.

1915. *March, 25.*

Greaves, J.—One Abdul Sutter was married to three wives. His first wife was one Bassimunnessa and she predeceased him leaving one son Safiur Rahman who is defendant No. 1. His second wife was one Amatoonnessa Bibi who survived him and died in January 1908. She had two children, namely, Abdul Rahman, defendant No. 2 and a daughter Khodajunnessa Bibi, defendant No. 3. His third wife was one Dulinjan Bibi who survived him

* Appeal from Original Civil No. 5 of 1916, against the decree of Mr. Justice Greaves, dated the 25th March, 1915.

(1) (1889) L. R. 16 I. A. 205; I. L. R. 11 All. 460.

and died in December 1909 leaving three children who are the plaintiffs, Ajijur Rahman, Lutfur Rahman, and Sakina Bibi. Abdul Sutter died on 15th July, 1907. By a deed of gift or Heba-bil-ewaz which is Exhibit 2 in this case and dated 20th January 1906 Abdul Sutter after reciting that he was advanced in age and that he had no hope of living much longer and also reciting the then state of his family, no mention being made of the infant plaintiff Lutfer Rahman who was born shortly after the execution of this document, recited therein that he had given away to his third wife and her son and daughter his own family dwelling house No. 18 and the carriage and horse business in Beliaghatta Road in the town of Calcutta, and had paid Rs. 250 in Company's currency on account of the Den-mohur of his third wife and that he gave to his second wife and her infant daughter certain property therein mentioned and that he had retained for his own use certain land therein mentioned and also a 7-anna share in No. 6 Marsden Street Calcutta, gave certain property therein mentioned to his two sons, defendants Nos. 1 and 2. By a second deed of gift or Heba-bil-ewaz which was dated 28th January 1906 but which according to the evidence before me was executed on 20th January 1906 and which contained recitals similar to those contained in the last mentioned document including a reference to the gift of the house No. 18 Beliaghatta Road and his horse business in connection therewith to his third wife, gave to his second wife and her daughter certain properties therein mentioned. These two documents were not produced before me and the evidence with regard to them is as follows, such evidence being given by the first defendant Safiur Rahman. He states that he saw the originals at the time of their execution and that the document of 20th January 1906 after execution and registration remained in his possession and that the document of 28th January 1906 remained with Amatoonnessa Bibi the second wife of Abdul Sutter. He further stated that he took this second document from her for the purpose of filing a suit which was in fact brought and that both documents were last in his possession in the month of December 1908 and that he kept them in his residence in Calcutta but that in the month of December 1908 he was minded to go to his native village at Gandhapur and that he took them with him in a bundle together with other papers and belongings. He stated that these were handed by him to a cooly to take to the station but that the cooly decamped with them on the way and that he had seen nothing of them since. He stated that on the day after the loss he lodged a

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complaint at the Fenwick Bazar thana which was taken down the book kept at the thana containing the entry of this complaint was produced before me. The parties to this suit are Shaikh Nawabjan who is the father of Dulinjan Bibi and Bhoja Bibi who is the mother of Dulinjan Bibi and three infant children of Dulinjan Bibi whose names I have already mentioned. The second plaintiff Bhoja Bibi is the legal guardian of these three infants having been appointed such by an order of the Alipore Court dated 19th August 1910. When she was appointed guardian, she stated in her petition and it is so stated in the order that these infants had property to the value of about Rs. 11,000 and the scheduled properties referred to in her petition contain a reference to the house in No. 18 Beliaghatta Road as forming part of the properties of the infants. The plaint in this suit only refers to the first deed of gift namely that of 20th January 1906, but I allowed an amendment to be made by the insertion of a reference to the second deed of gift of 28th January 1906, and the case has been argued before me as if both these documents were attacked. The plaint after referring to the family of Abdul Sutter and other matters states that Abdul Sutter was at the time of his death possessed of considerable properties both movable and immovable and that a list of the properties so far as the plaintiffs have been able to ascertain them is contained in schedule A to the plaint and in paragraphs (7) and (8) of the plaint, the plaintiffs ask for partition. Paragraph (9) refers to the document of 20th January 1906. It does not state that that document was a forgery but it states that it was executed at a time when Abdul Sutter was suffering from death illness and that it was made in contemplation of death but the case has also been argued before me on the footing that this document is a forgery. By the prayer of the plaint the plaintiffs in addition to the relief referred to ask for an account of the rents and profits of the estate and the dealings of the first defendant therewith, the first defendant being alleged to have taken possession of the deceased's properties after his death.

Paragraph (3) of the written statement deals with the properties in schedule A and I shall have to refer to this later on. Paragraph (6) of the written statement deals with the share of the plaintiffs in the estate of Abdul Sutter and paragraph (7) purports to render an account of the sums for which the plaintiffs are alleged to be liable in respect of the debts of the estate and also sets forth certain payments which are alleged to have been made by the first defendant for, or on behalf of, the infant plaintiffs. The issues which were settled in this case and which I have to decide are as follows :—

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(1) Whether the deeds of gift of 20th January 1906 and 28th January 1906 in favour respectively of the 1st and 2nd defendants and Amatoonnessa Bibi and her daughters are valid.

(2) Whether any and which properties in schedule A of the plaint are liable to be partitioned as forming part of the estate of Abdul Sutter.

(3) Whether any and what enquiries should be directed as to what the estate of Abdul Sutter consisted of at the time of his death.

(4) Whether the defendants are entitled to any and what account against defendant No. 1.

With regard to the first issue I have already referred to the loss of these deeds and I accept the evidence of the first defendant as to their loss and execution. This evidence is corroborated by that of one attesting witness who was called before me and whose name is Abdul Goffur but I am also fortified in this decision by the fact that there is in evidence before me the registration of the two deeds. The plaintiff Shaikh Nawabjan was one of the attesting witnesses to the two documents but he professes to have no recollection of having attested them. I do not think that he was an untruthful witness but having seen him in the box I can place no reliance on his memory or on the evidence which he gave before me. I accordingly hold with regard to the two documents of 20th January 1906 and 28th January 1906 that they are valid, and I accept the evidence of the first defendant with regard to the state of health of Abdul Sutter at the time these documents were executed. Apparently on the date these documents were executed he was able to walk a considerable distance from Gandhapur to Calcutta before taking the train and a like distance on the return journey. I think the distance amounts to about 12 miles in all and I accept this evidence and the other evidence that was given before me by the first defendant with regard to his state of health. In connection with this issue, it is necessary to consider the question that was argued before me with regard to the existence of the ticca ghary business and the house at No. 18 Beliaghatta Road. I left considerable difficulty with regard to this matter in the course of the case but I have come to the conclusion that both the house and business in fact existed and were made over to the infant plaintiffs or taken possession of by the first two plaintiffs or by the infant's mother during her life-time on behalf of herself and the infants. With regard to the existence of the Beliaghatta business the evidence is as follows:—Shaik Abdul Gunny was called as a witness before me on behalf of the defendants. He is a license

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Inspector of the Manicktolla Municipality and he produced a hackney-carriage register and other books which are kept under his custody. Now it appears from this register that in the year 1904 a small ticca ghary business was carried on at No. 19-22, Beliaghatta Road under the name of Ajijur Rahman and Abdul Sutter and that the license dues were paid on 7th April 1904 and 28th April 1904 in respect of the licenses which appear in that book. In the entries for the years 1906-1907 the name of Ajijur Rahman the infant plaintiff appears as the licensee in respect of two carriages at No. 107 Beliaghatta Road and it appears that the license dues were paid on 2nd November 1966. It appears to me from a perusal of these entries that it is clear that there was a ticca ghary business carried on by Abdul Sutter prior to his death in some house in Beliaghatta Road and that such business after his death passed to the infant plaintiffs. Then with regard to the existence of No. 18 Beliaghatta Road evidence was given before me by one Kamala Kumar Chowdhury who was the collecting clerk of the Manicktolla Municipality. It appears from his evidence that is to say, from the registers which he produced, that in the year 1905 and 1906, Abdul Sutter was assessed for two thatched huts and one stable with two stalls at 141-4 Beliaghatta Road and that Shaik Nawabjan the first plaintiff was assessed for two thatched huts and two thatched stables and four stalls at No. 141-3 in the same road. From the register for 1900-01 it appears that Abdul Sutter was assessed for one thatched hut and two thatched huts with stable at 19-19 Beliaghata Road and that Shaikh Nawabjan was assessed for two thatched huts and a stable at 19-21 Beliaghatta Road. There is evidence before me of the change from these numbers to the numbers already referred to and of the consolidation of the two holdings 141-3 and 141-4 and a change in the number of these holdings to 153-1 which is apparently where Shaik Nawabjan and his wife now reside. There is no actual evidence with regard to No. 18 Beliaghatta Road and the books which were produced in Court by the witness Kamala Kumar Chowdhury do not refer to No. 18 but from the evidence before me I am satisfied that Abdul Sutter owned certain property consisting of huts and stabling in Beliaghatta Road and that that property was at one time numbered 19 in such Road. I think the inference is irresistible that No. 18 referred to in the two documents of 20th January 1906 and 28th January 1906 is a slip for No. 19 and I accordingly hold that it has been proved in evidence before me that Abdul Sutter was possessed of a ticca ghary business and a house in Beliaghatta Road both of which passed on

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his death to the possession of the infant plaintiffs or their mother. I am satisfied on the evidence that was given before me that there was, after the documents of the 20th and 28th January were executed, delivery of possession of the properties to which they refer to the first defendant so far as relates to the properties given to him and also so far as relates to the properties given to Amatoonnessa delivery of possession to her. This is proved to my satisfaction by the evidence of the first defendant. There is no evidence before me that any consideration passed at the time these documents were executed although reference is made to such payment but the first defendant in fact stated in evidence that nothing was paid at the time of the execution of the deeds by his father although it is argued before me that this answer was not directed to this express point. I am also satisfied that possession was taken of the property by the first defendant on behalf of himself and the second defendant who is a minor and I see no reason why in spite of the cases which were quoted before me in *Mata Din* v. *Sheikh Ahmad Ali* (1) and which in my opinion has nothing to do with this particular question, I say I see no reason why this is not a valid taking of possession. It was also urged before me that a joint gift by one deed could not be made under Mahomedan Law and I was referred to a case *Mullick Abdool Guffoor* v. *Muleka* (2) in support of this proposition but the property in the present case was let out to tenants and accordingly I see no valid objection to the gift on this score.

With regard to the second issue and the properties in schedule A, property No. 1 is comprised in the document of 20th January 1906, and accordingly was not the property of Abdul Sutter at the time of his death. With regard to properties Nos. 2, 4, 5 and 6 I am satisfied on the evidence before me that these properties never formed any part of the estate of Abdul Sutter. With regard to property No. 3 in schedule A that did not form any part of the estate of Abdul Sutter at the time of his death as it was comprised in the deed of gift of 28th January 1906 and with regard to property No. 7 in schedule A I find on the evidence before me that that is also comprised in the deed of gift of 20th January 1905. With regard to the third issue in my opinion it is not necessary to direct any enquiry as the estate of Abdul Sutter consisted, at the time of his death, of a seven annas share in 6 Marsden Street, Calcutta, and certain properties at Gandhapore, a list of which is contained in the document of 20th January, 1906. With regard to the 4th issue I find on the evidence before me that

(1) (1912) 15 C. L. J. 270; I. L. R. 34 All. 213. 16 C. W. N. 338.
(2) (1884) I. L. R. 10 Calc. 1112.

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the infant plaintiffs are liable for certain debts which were due from the estate of the deceased at his death, their share of such debts amounting to the sum of Rs. 705-10-7½ pice. Some argument was addressed to me whether they would be liable in respect of one debt of the testator which is one of the items which make up this sum of Rs. 705-10-7½ pice on the ground that certain property which passed under the deed of gift of 20th January, 1906 passed to the first defendant with the liability for a mortgage thereon. I am satisfied on the evidence before me that the property alleged to be mortgaged namely 10, Wellesley 2nd lane was not in fact comprised in the mortgage and that the testator's estate was liable for this item. Defendant No. 1 claims as against the infants to charge them with a sum of Rs. 408-12 for interest. This seems to be calculated at a very exorbitant rate. I understand it is something like 75 per cent. per annum and I disallow any claim for interest. But in addition to the sum of Rs. 705-10-7½ pice it is admitted that the infants are liable for two other sums *viz.*, a sum of Rs. 30-15-10½ pice for Municipal rates in respect of 6 Marsden Street, and also a sum of Rs. 129-8 for repairs to No. 6 Marsden Street, that is to say, the plaintiffs are liable for these three sums which together amount to a sum of Rs. 866-2-6. The first defendant also claims to have made certain payments to or on behelf of the plaintiffs or to their mother during her life during the years, 1907—10. It may well be that certain payments were made by the first defendant to the infants or on their behalf but he is in a position of a trustee and he produced no accounts of such payments before me and under the circumstances I do not think it would be right to allow any such amounts. The result is that I disallow the claim of the defendant No. 1 for the sum of Rs. 408-12 for interest and for Rs. 446-15-9 for the advances alleged to have been made. These sums amount to Rs. 855-11-9. I find indeed it is admitted that defendant No. 1 has received on account of the sum of Rs. 866-2-6, sums amounting to Rs. 336-14 in respect of the infant's share of the rents of 6 Marsden Street for the years from April 1910—January 1912. He also admits that since that date up to the present time he has been receiving the infant's share of these premises, that is to say, roughly for a period of three years or 36 months and on a calculation of the amount of rent received on account of the infant's share for those 36 months, I find that a sum of Rs. 540 or thereabouts has been received by the defendant No. 1 and if this sum is added to the sum of Rs. 336-14 you arrive at a total of Rs. 876-14, that is to say, the sum due

from the infant of Rs. 866-2-6 is in effect cancelled by the sum received by the defendant No. 1 on account of the infant's share of the rents of the premises No. 6 Marsden Street, with the result that I find there is no necessity for accounts and that there is no sum due from the infant plaintiffs to the defendant No. 1 or from the defendant No. 1 to the infant plaintiffs. The only order I have to make in this case is to declare that the parties are interested in the premises forming part of the testator's estate at the time of his death as to the plaintiffs to half, and I declare that the three defendants are between them entitled to the other half of the premises to be partitioned. It appears that the seven annas share of 6 Marsden Street is in the course of being sold in pursuance of a mortgage decree and therefore there is no necessity to make any order for partition with regard to that and I accordingly make the usual partition decree only with regard to the properties at Gandhapore which are referred to in the document of 20th January, 1906. I direct costs to be taxed and I direct that half of the costs of defendants shall be paid to them from the share of the infants when realised from the properties above referred to including half of reserved costs (if any).

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Mr. Rasul.—When the case was called on for the first time, the case was adjourned because the translation of a document which the other side wished to put in as evidence was not ready. I ask for a direction with regard to those costs.

The Court—You will get half costs of hearing before me, half of reserved costs and half costs of the first day's hearing which were partially thrown away.

Against this judgment, the plaintiffs appealed.

Messrs. U. N. Sen Gupta and *S. N. Ghose* for the Appellants.

Messrs. S. C. Mukerjee and *H. D. Basu* for the Respondents.

C. A. V.

January, 28.

Sanderson, C. J.—This is an appeal against the judgment of Greaves J, and on the hearing of the appeal the arguments have been mainly addressed to the question whether the learned Judge's conclusion as to the validity and effect of the two deeds, dated 20th January 1906 and 27th January 1905 are correct. (The latter deed is referred to in the judgment of the learned Judge as being dated the 28th January 1906).

These documents were executed in the form of Heba-bil-ewaz or "gift in exchange" and each deed contained a recital that Abdul

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Sutter had received two pieces of gold coin by way of consideration from the donees; the learned Judge, however, has found that there was no evidence of any consideration passing at the time of the execution of the deeds, but on the contrary the first defendant him-himself had in fact stated in his evidence that nothing was paid at the time of the execution of the deeds by his father.

Consequently these deeds must, in my judgment, be treated as having been made without consideration and merely as Hebas.

The deeds being treated as Hebas, it would be necessary for the donees to take possession of the subjects of the gifts in order to make the gifts valid.

The learned Judge has found that there was, after the deeds were executed, delivery of possession of the properties, to which they refer, to the first defendant so far as relates to the properties given to him, and also so far as relates to the properties given to Amatunnessa, delivery of possession to her, and he further says that this was proved by the evidence of the first defendant.

The evidence on this point is contained at pages 149 and 150 of the paper book as follows :—

"Q. After the deeds were executed and registered, what happened to the properties ?

A. The persons to whom they were given came into possession of them.

Q. With regard to the properties given to you, did you do anything after possession was given to you ?

A. Yes.

Q. What ?

A. I had my name substituted in respect of them in the Municipality as also in the Collectorate, and I also used to get the tenants to sign the counter-foils of receipts for monies paid by them.

* * * * * *

Q. In consequence of your application your name was registered ?

A. Yes, I also filed the deed of gift along with my application in the Collectorate.

* * * * * *

Q. With regard to the properties given to them, do you know what happened to these properties ?

A. Those given to Amatunnessa were taken possession of by her."

I think there is enough to justify the learned Judge's finding, especially in view of the fact that the above-mentioned statements

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in the evidence of the first defendant do not seem to have been challenged by cross-examination.

It was, however, argued on behalf of the appellant that even if there was possession of the property included in the Heba of the 20th January 1906, the deed was not valid by reason of the gift being one of undivided property, which was capable of partition, to adult and minor sons.

This argument was founded on the objection of 'confusion' which was said to apply to such a case, viz, that in the case of the deed of 20th January 1906, the donor being the father, and therefore the guardian of his minor son, would take seisin of the minor's share at the time of the gift and thus confusion would be created.

This objection, according to the later authorities, could be avoided by the adoption of a device which is referred to in the books, viz., that the entire property should be consigned to the adult, and then a gift of it made to both. So that apparently, according to Mahomedan Law, there is nothing to prevent a gift of undivided property by a father to an adult and minor son, provided that the proper form or device is used for the gift. Further, it has been laid down by the Judicial Committee of the Privy Council in *Mahammad Mumtaz Ahmad* v. *Zubaida Jan* (1) that the doctrine relating to the invalidity of gifts of Mushaa is wholly unadopted to a progressive state of society and ought to be confined within the strictest rules.

The principle of the objection already referred to seems to be that when a person makes a gift to an adult and an infant who is in the donor's guardianship, the donor is assumed to take seisin of the minor's share, whereas the gift in favour of the adult requires acceptance, and thus confusion is occasioned.

In this case the gift was contained in a formal document, duly executed and registered, in which it was stated that the adult son, Safiur Rahman, was the guardian of Abdul Rahman, the minor son; and I think the intention of the donor was that the adult son should act in respect of these properties for his minor son. Under such circumstances, I do not think that the confusion hereinbefore referred to would be created, inasmuch as the adult son and not the father would take seisin of the minor's share at the time of the gift: in any event, in view of the opinion expressed by the Judicial Committee of the Privy Council, I do not propose to extend the doctrine by applying it to the facts of this case.

Then it was argued (1), that the father did not in fact appoint

(1) (1889) I. R. 16 I. A. 205 (215); I. L. R. 11. All. 460.

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the elder son as guardian to take possession, and (2) that he could not divest himself of his guardianship and appoint the elder son as guardian even if he intended so to do.

As regards the first of these two points, it is true there is no express provision in the deed authorising the elder son to take possession as guardian for the minor son. This is not surprising, when one remembers that the deed was intended to be a "Heba-bil-ewaz" and not a mere "Heba," and consequently the donor purported by the deed, in exchange for the consideration there mentioned, to put the two sons in possession. On the other hand, I think it is clear that the father, being advanced in age and not expecting to live much longer, intended to divest himself of all interest in the property and to appoint the elder son guardian of the minor, and to do whatever was necessary in respect of these properties on behalf of the minor son, and, if taking possession was necessary, that would be included within the authority conferred upon the elder son as guardian.

As regards the second of the above-mentioned points, it was urged that the father could not divest himself of the right and duty of guardianship over his minor son, and consequently the appointment of his elder son as guardian being invalid and ineffective, the gift contained in the deed was also invalid.

No authority was produced, in answer to our request, for the proposition that by Mahomedan Law a father cannot divest himself of his guardianship of a minor son in a proper case and by appointing a proper person.

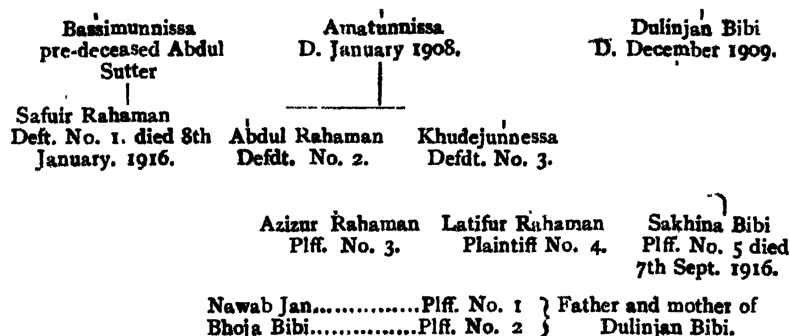
The father is no doubt the natural guardian of the minor son, but, under the circumstances which existed in the present case, *viz.*, that the father was advanced in years, and did not expect to live long, and, desiring to prevent ill-feeling and disputes amongst his children and wives, he wished to make a disposition of his property, I do not think there is any good reason why he should not delegate his guardianship by appointing his elder son the guardian of his minor son, and, in the absence of any authority to the contrary, in my judgment it was competent for him so to do.

The considerations above-mentioned apply, *mutatis mutandis* to the second deed dated the 27th January, 1906 whereby Abdul Sutter appointed his wife Amatunnessa Bibi guardian of his infant daughter Khudejannessa: in the case of this deed also, for the reasons above-mentioned, I think it was competent to Abdul Sutter to delegate his guardianship by appointing his wife guardian of his

infant daughter and to make a valid gift of the properties therein mentioned in favour of Amatunnessa and his infant daughter.

For these reasons, in my judgment, this appeal should be dismissed with costs.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for declaration of title to property alleged to have been left by one Abdul Sutter, a Sunni Mahomedan who died on the 15th July, 1907. Abdul Sutter had three wives, Basimunnessa, Amatunnessa and Dulinjan—by each of whom he had children. The first wife predeceased him and the third wife who survived him died before the institution of this suit. The plaintiffs are the legal representatives of the third wife, and his children by her. They are admittedly entitled to a half-share of whatever forms part of the estate left by Abdul Sutter. The defendants are his children by the first and second wives. The relationship of the parties will appear from the following genealogical table.



The controversy between the parties centres round two documents executed by Abdul Sutter on the 20th January, 1906 and the 27th January 1906 respectively and registered on the 6th February, 1906. By these instruments Abdul Sutter transferred a considerable portion of his estate, the earlier in favour of the two sons by the first two wives ; the latter in favour of the second wife and her daughter. The documents on the face of them purport to be Heba-bil-ewaz, that is, gifts for consideration, namely, two gold mohurs in each case. Mr. Justice Greaves has found that, as transpires from the evidence of the first defendant, the son of the first wife, no consideration in reality passed at the times of the execution of the documents or at any subsequent period. Consequently the deeds must be treated as Hibas and not Hibas-bil-ewaz It is well-settled that the burden of

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proof lies on the person in whose favour a Heba-bil-ewaz is executed to establish that the consideration was paid as described in the instrument ; and there is no room for the application of the doctrine recognised by the Judicial Committee and by this Court in the cases of *Chowdry Deby Persad* v. *Chowdry Dowlut Sing* (1) ; *Raja Sahib Prahlad* v. *Budhu Sing* (2) ; *Ali Khan* v. *Indar Parshad* (3) and *Fulli Bibi* v. *Bassirudi* (4), that where the executant of a document denies receipt of the consideration recited in a bond, the burden lies upon him to establish that the recital is incorrect in fact. *Khajurinnessa* v. *Rowshan* (5) ; *Chaudhuri Mehdi Hasan* v. *Muhammad* (6) ; *Rahim Jan Bibi* v. *Iman Jan* (7). The true position thus is that to establish the validity of the gifts covered by these two instruments, it is incumbent on the defendants to prove strict compliance with the requisites deemed essential for the validity of a gift under the Mahomedan law. This brings us to the crucial point in the case. The earlier gift, as already stated, was in favour of the two sons by the first two wives of whom one was an infant. The later gift was in favour of the second wife and her infant daughter. Mr. Justice Greaves has found that possession was as a matter of fact delivered to the adult donee in each instance, and the evidence supports this conclusion ; indeed, there is no evidence to rebut the testimony of the first defendant on this point. Now, as concisely stated in the Hedaya, gifts are rendered valid by tender, acceptance and seisin. The plaintiffs contend with reference to this exposition of the law, that the gifts were invalid on two grounds, *first*, that as there was, in each instance, a gift in favour of an adult and an infant, there was mushaa or coufusion ; and *secondly*, that there was no valid acceptance of the gift on behalf of the infants concerned, by persons legally competent to act in that behalf.

As regards the first objection which is sought to be supported by reference to the decision in *Nizamuddin* v. *Zabeda Bibi* (8), adversely commented on by Ameer Ali in his Mahommedan Law, Vol. I, page 101 it is sufficient to observe that as pointed out by the Judicial Committee in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (9) the doctrine relating to the invalidity of gift of mushaa is

(1) (1844) 3 M. I. A. 347 (354) ; 6 W. R. P. C. 55.
(2) (1869) 2 B. L. R. P. C. 111 (122) ; 12 M. I. A. 275 ; 12 W. R. P. C. 6.
(3) (1896) I. L. R. 23 Calc. 950 (P. C.) ; L. R. 23 I. A. 92.
(4) (1869) 4 B. L. R. 54 (F. B.)
(5) (1876) L. R. 3 I. A. 291 ; I. L. R. 2 Calc. 184.
(6) (1905) I. L. R. 28 All. 439 ; 4 C. L. J. 295.
(7) (1911) 17 C. L. J. 173. (8) (1874) 6 All. H. C. R. 338.
(9) (1889) L. R. 16 I. A. 205 ; I. L. R. 11 All. 460.

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wholly unadapted to a progressive state of society and ought to be confined within the strictest rules. In a later case *Ibrahim Goolam Ariff* v. *Saiboo* (1), the Judicial Committee refused to extend the doctrine to forms of property unknown in archaic times. The principle itself rests on two reasons; namely, first, seisin in case of gifts is expressly ordained; a complete seisin is impracticable with respect to an indefinite part of divisible things as it is impossible to make seisin of the thing given with something that is not given; and secondly, if the gift of part of a divisible thing without separation were lawful, it must necessarily follow that a thing is incumbent upon the giver which he has not engaged for, namely, a decision which may possibly be injurious to him. These reasons obviously cease to be applicable when possession as a matter of fact has been delivered, and for this reason the Judicial Committee has held that whether a gift of undivided property is valid or not under Mahomedan Law, possession given and taken under such gift effectually transfers the property. This view is in harmony with the well-established rule explained by this Court in *Mariam Bibi* v. *S. G. Ibrahim* (2) that the objection on the ground of mushaa when a gift is made to an adult and an infant may be evaded by a simple devise described in the Fatawa Alamgiri; namely, that "he (the father) should deliver possession of the house to the adult son and then make a gift of it to both of them." [Fatawa Alamgiri Vol. IV. 549; see also the Bazazia quoted by Ameer Ali in his Mahomedan Law, Vol. I. page 105, 4th Edition.] The gift in the present case cannot consequently be deemed invalid on the ground of mushaa.

As regards the second objection, the contention of the appellant is that the father was the guardian of the infant sons, that he was incompetent to divest himself of his obligations as guardian, that he could not appoint his major son in the one instance and his wife in the other, to act as guardian for the purpose of acceptance of the gift on behalf of the respective infants, and, that consequently there has been no valid acceptance of the gift in law. No authority has been brought to our notice in respect of this ingenious argument and I cannot discover any principle in Mahomedan Jurisprudence wherefrom it derives the semblance of support. It is indisputable that where a gift is made by a father to his infant son, no change of possession is necessary; the principle is that the decalration of gift is deemed to change the possession by the father on his own account into possession as guardian on his son's account and the

(1) (1907) L. R. 34 I. A. 67; I. L. R. 35 Calc. 1.

(2) (1916) Original Side Appeal No. 55 of 1915.

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law is the same in every other case where the donee is a minor in lawful custody of the donor: *Ameeroonnissa Khatoon* v. *Abadoonnissa Khatoon* (1); *Fatima Bibee* v. *Ahmad Baksh* (2). If in such circumstances, the donor with a view to avoid the difficulty created by the doctrine of Mushaa, nominates an adult relation as guardian of the infant for the purpose of acceptance of the gift, it is difficult to appreciate why his action should be deemed as beyond his authority. On the other hand there are texts which point to this conclusion that such a course is not contrary to any established principle of Mahomedan Law. Thus Baillie in his Digest of Mohammedan Law, Vol. I, Book VIII, Chapter V, 1875, page 539 observes: "The donee, when competent to take possession, has the right to take it. When he is a minor, or insane, the right to take possession for him belongs to his guardian, who is first his father, then his father's executor, then his grandfather, then his executor, and next the judge, and person appointed by him. It is alike whether the minor be in the family of any of these persons or not. If the father or his executor, or paternal grandfather or his executor, be absent at a precluding distance, possession may be taken for a minor by any person under whose power he may happen to be. And with regard to others besides the father and grandfather, such as the brother, paternal uncle, mother, and other relatives, they have all, on a favourable construction, the power to take possession of a gift for a minor when he is in their family." The view I take receives support from the following texts mentioned by Dr. Abdullah-al-Mamun Sahrawardhy in his learned lectures on Moslem Legal Institutions.

I

When the father makes a gift of something in favour of his infant son, the infant becomes its owner by virtue of the contract.

(*Quduri*, Vol. II., page 10, Ed. Delhi).

II

The gift of a father in favour of his infant child is completed by the contract.

(*Fatawa Alamgiri*, Vol. IV., page 546, Ed. Cal.)

III

It is stated by Al-Hakim: where a father makes a gift of a house in favour of two of his sons, one of whom is an adult and the other a minor, and the adult son takes possession of it, the gift is void

(1) (1874) L. R. 2 I. A. 87; 15 B. L. R. 67.
(2) (1903) I. L. R. 31 Calc. 319.

and this is the correct view. For, the gift in favour of the infant becomes completed by the very act of making the gift, as the possession by the father stands in the stead of his (infant's) possession, and the gift in favour of the adult son stands in need of acceptance. Thus, the gift in favour of the infant precedes and mushaa is occasioned. The device is that he should deliver the house to the adult son and then make a gift of it to both of them.

(*Fatawa Alamgiri*, Vol. IV., page 549, Ed. Cal.)

IV

If the infant is in the custody of the grand-father or the brother or the mother or the paternal uncle and a gift is made in favour of the infant and taken possession of by the person in charge of the infant while the father is present, there is difference of opinion among the jurists with respect to it: some jurists are of opinion that it is not valid, and the correct view is that it is valid.

(*Fatawa Qazikhan*, Vol. IV, page 289, Ed. Lucknow.)

V

Contrary to the case of the mother and of those other than her (mother) maintaining her (minor girl) because the right of taking delivery of possession does not belong to them except after the death of the father or his absence at a precluding distance according to the correct view.

(*Hedayah*, Vol. VII, page 495, Ed. Cairo.)

VI

Al-Kifayah (Vol. VII, page 496, Ed. Cairo.) the famous commentary on the Hidayah reproduces Text IV.

VII

The Shaykh-al-Islam Khwahir Zodah states: in his Mab-sut there are some amongst our jurists who hold that the husband, the stranger, the father, the grand-father and the brother are all equal and they are of opinion that their taking delivery of possession is valid when the infant is in their charge even though the father is present.

(*Nataij-al-afkar* Supplement to the *Fathal-Quadir* the celebrated commentary on *Hedayah*, Vol. VII., page 496, Ed. Cairo.)

VIII

The author does not mean to restrict the rule to the mother and the stranger, but means that every relation excepting the father, the grand-father and their executors, is like the mother. The gift

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becomes complete by their taking possession if the infant is in their charge, otherwise not.

(*Bahral-raig*, Vol. VII., page 314, Ed. Cairo.)

IX.

It is also stated with respect to the grand-father, that he cannot have the right to take possession on behalf of the minor, if the father is alive and no distinction has been indicated between the case where the minor is in his (grand-father's) charge and where he (the minor) is not. The obvious meaning of what he (author) has laid down without any restriction, leads to the necessary conclusion that it (the grand-father's taking possession on behalf of the minor) is not valid.

(*Fatawa Alamgiri*, Vol. IV, p. 549, Ed. Cal.)

X.

The *Fatawa Alamgiri* reproduces here the extract from the *Fatawa Qazikhan* quoted above (Text IV) and proceeds as follows: Thus it is laid down in the *Fatawa Qazikhan*. "And the *Fatawa* is giving according to this opinion": Thus it is laid down in the *Fatawa Sughra*.

(*Fatawa Alamgiri*, Vol. IV, p. 548, Ed. Cal.)

XI.

The gift in favour of a child by one who has its guardianship generally is completed by the contract.

(*Tanwir-al-Absar*, Vol. IV, p. 512, Ed. Cairo.)

XII.

"One...guardianship generally": *i. e.*, every one who maintains it, has charge of it. Thus the brother and the paternal uncle in the absence of the father are included provided that the child is in their charge.

(*Durr al-mukhtar*, Vol. IV, p. 512, Ed. Cairo.)

XIII.

It is laid down in the *Barjindi*:—There is difference of opinion, where possession has been taken by one, who has it (the child) in his charge when the father is present. It is said, it is not valid; and the correct opinion is that it is valid.

(*Radd-al-Muhtar*, Vol. IV, p. 513, Ed. Cairo.)

XIV.

The author of the *Hindiya* (the *Fatawa Alamgiri*) cites the *Khaniyah* (*Fatawa Qazikhan*) to the effect that "it is valid

and the *Fatawa Sughra* to the effect that "the *Fatawa* is given according to this opinion." (See Text X above).

(*Al-Tahtawi*, Vol. III, p. 398, Ed. Cairo).

I hold accordingly that in each of the two instances before us, there was a valid tender, a valid acceptance and a valid transference of seisin and that the legality of the transaction connot be successfully impeached. On these grounds I agree that the decree of Mr. Justice Greaves must be affirmed and this appeal dismissed with costs.

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Messrs. Dutt & Son : Attorneys for the Appellants.

Mr. B. K. Deb : Attorney for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

J. C. GALSTAUN

v.

WOOMES CHANDRA BONERJEE.*

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July, 21.

Rateable distribution—Consent decree—Agreement that movable properties to be sold by agent of the parties—Court accepting the agreement—Civil Procedure Code (Act V of 1908), Sec. 73, O. 21 R. 65—Assets, receipt of—Auctioneer, duty of.

When an agreement of the parties, that the movable properties of the judgment-debtor would be sold by M, was accepted by the Court and embodied in a consent decree, and when, upon the application of the judgment-debtor, the Court instructed M to hold the sale, the Court took a step in execution and the sale was held in execution by a person appointed by the Court 'in that behalf' within the meaning of rule 65 of order 21 of the Code of Civil Procedure. The sale was in essence a sale by the Court itself.

Golam v. *Fatima* (1) distinguished.

Receipt of entire purchase money by an auctioneer from the purchaser in execution of a sale held under order 21 rule 65 of the Code of Civil Procedure is receipt of assets by the Court within the meaning of sub-section (1) of section 73 of the Code of Civil Procedure.

* Civil Rule No. 327 of 1916, against an order of Babu Umes Chandra Chakrabarti, Subordinate Judge of 24-Perganahs, dated the 27th March, 1916.

(1) (1910) 16 C. W. N. 394.

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Maharaja of Burdwan v. *Apurba* (1) distinguished.

The policy which underlies section 73 of the Code of Civil Procedure is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained ; that point of time is the moment when the entire purchase money has been paid by the purchaser and not when the auctioneer sent it to Court. It is immaterial, whether the purchase money has been actually paid into the treasury or into the hands of a person employed by the Court to hold the sale.

When an auctioneer receives the purchase money as agent of the vendor, it is his duty immediately to account for it and pay over the balance due to the latter.

A consent order is a mere creature of agreement and carries out the agreement between the parties. The contract is not the less a contract and subject to the incidents of a contract, because there is superadded the command of a Judge.

Huddersfield Banking Corporation v. *Leicester* (2) and *Wentworth* v. *Buller* (3) referred to.*

Application for Revision.

Application for rateable distribution of assets.

The material facts and arguments appear from the judgment.

Mr. Zorab and *Babu Bankim Chunder Mukherjee* for the Petitioner.

Sir S. P. Sinha (Advocate-General), Mr. C. C. Ghose and *Babu Satis Chunder Mukherjee* for the Opposite Party.

The judgment of the Court was delivered by

July, 21.

Mookerjee, J.—We are invited in this Rule to set aside an order made in a proceeding for rateable distribution under section 73 Civil Procedure Code The sequence of events which led to the order in question, is really not in controversy and may be briefly stated. On the 23rd August 1915, one Bonnerjee, now opposite party in this Rule, obtained a decree for Rs. 22,441 against Sullivan on the Original Side of this Court. On the 26th August 1915, one Mahomed Abbas obtained a consent decree against Sullivan for Rs. 5,200 in the Court of the Subordinate Judge of the 24-Parganahs. On the 31st August 1915, Galstaun, petitioner in this Rule, obtained a decree for Rs. 8,105 against Sullivan on the Original Side of this Court. On the 21st and 22nd September 1915, a considerable sum was realized by a sale of the movable properties of the judgment-debtor held by Mackenzie Lyall & Co., under the orders of the Subordinate Judge. The question in controversy is,

(1) (1911) 16 C. L. J. 50.

(2) (1895) 2 Ch. 273.

(3) (1829) 9 B. & C. 840.

* [See *Keshab Panda* v. *Bhobani Panda* (1913) 18 C. L. J. 187—Rep.]

whether Galstaun is entitled to rateable distribution of the sale proceeds. To appreciate the precise position of the rival claimants, we must examine in detail the proceedings taken for execution of the three decrees.

As regards the first decree, we find that a precept was, on the 24th August 1915, sent to the Court of the Subordinate Judge under section 46, Civil Procedure Code, and the movable properties of the judgment-debtor were attached on that basis. On the 6th September 1915, an order was made by this Court for transfer of the decree to the Court of the Subordinate Judge of the 24 Perganahas for execution. As regards the second decree, we find that Abbas applied for execution on the 8th September, 1915. On that very day, an order was made for sale of the properties by Mackenzie Lyall & Co., but the proceeding thus initiated was dismissed on the 20th September, as Abbas had in the interval transferred the decree to Bonnerjee. On that very day, Bonnerjee made an application to execute the decree as assignee thereof. The sale previously mentioned was held by Mackenzie Lyall & Co., on the 21st and 22nd September, 1915. As regards the third decree, we find that Galstaun was not able to obtain an order for transfer from this Court to the Court of the Subordinate Judge, till the 15th December 1915; and his application for execution was not made before the Subordinate Judge till the 14th March, 1916. Mackenzie Lyall & Co. sent a cheque to the Subordinate Judge on the 15th March 1916, for Rs. 12,637, the net proceeds in their hands. The question arises, whether in these circumstances Galstaun is entitled to obtain rateable distribution under section 73, Civil Procedure Code.

The first sub-section of section 73 is in these terms: "Where assets are held by a Court, and more persons than one have, *before the receipt of such assets*, made applications to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons." Two of the requisite elements are established in this case; namely, *first*, assets are held by the Court of the Subordinate Judge; and *secondly*, each of the decree-holders has obtained a decree for payment of money against the same judgment-debtor and has not obtained satisfaction thereof. The question, consequently, reduces to this: who among the rival claimants, did, before the receipt of the assets by the Court, make an application to the Court for execution of his decree? In the determination of this question, two points require consideration namely,

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first, what was the true position of Mackenzie Lyall & Co. when they held the sale of the movable properties on the 21st and 22nd September 1915; did they hold the sale as the agents of the Court or as the agents of the judgment-debtor Sullivan? *Secondly*, was the receipt of money by the auctioneers equivalent to "receipt of assets by the Court" within the meaning of section 73, Code of Civil Procedure.

The determination of the first question depends upon the terms of the consent decree made in the suit between Abbas and Sullivan and the true significance of the proceedings taken for the enforcement of that decree. It is indisputable that the sale was held, not in execution of the first or the third decree, but in a proceeding on the basis of the second decree. Was the sale, then, held on the basis of the second decree by Mackenzie Lyall & Co. as in execution of that decree or was it held at the instance of the judgment-debtor and was in essence a private sale for his benefit alone? The answer depends upon the true construction of the consent decree, in which, as happens frequently, sufficient care was not taken to set out precisely the reliefs granted to the successful litigant. That decree, as we read it, provides that "the defendant Sullivan will sell through Mackenzie Lyall & Co. the whole of the furniture belonging to him, and, according to the terms of the compromise, will pay out of the net sale-proceeds the sum of Rs. 5,200 to the plaintiff; that if the net sale-proceeds be not sufficient to pay the whole of the said sum, the proceeds shall be paid in part payment of the said sum of Rs. 5,200 and the plaintiff will recover the balance from the defendant; that for the payment of the said sum of Rs. 5,200, the furniture or the net sale proceeds thereof shall in the meantime be charged in the first instance with the payment of the said sum to the plaintiff." This decree clearly contemplated a sale in the first instance by the defendant himself through Mackenzie Lyall & Co. and payment by him to the decree-holder of the sum of Rs. 5,200 out of the net sale proceeds. It was with reference to this aspect of the consent decree that, as soon as it was made, the Court instructed Mackenzie Lyall & Co. to sell the furnitures. Difficulties however, arose from the conduct of the judgment-debtor who was for some unexplained reason unwilling to proceed with the sale, and what had been contemplated by the decree was not carried out. The result was that, on the 8th September 1915, the decree-holder was driven to apply to the Court for execution and for an order upon Mackenzie Lyall & Co. to sell the movables. This application was granted and an order was made as prayed. Whether such an

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order was or was not contemplated by the decree, it is not for us to determine in the present proceedings. But the fact remains that the Court issued instructions to Mackenzie Lyall & Co., to sell the furniture, and the correspondence between the Court and the auctioneers indisputably shows that the auctioneers proceeded to sell the movables of the judgment-debtor, not at his request but under the orders of the Court. Before the sale could actually be held, the decree had, however, been assigned by Abbas to Bonnerjee. Bonnerjee, as we have seen, thereupon applied for execution as assignee, under rule 16 of order 21 of the Code, and prayed that fresh instructions might be issued to the auctioneers to hold the sale of the moveables of the judgment-debtor. The Court held that such a step was unnecessary, obviously on the ground that instructions had already been issued to the auctioneers on the application for execution made by Abbas. The sale was then held on the 21st and 22nd September and a large sum of money was realised. It has been contended here that this was a sale held, not in execution at the instance of the Court but rather at the instance of the judgment-debtor Sullivan pursuant to the agreement between him and his creditor Abbas. In support of this argument, reference has been made to the decision in *Golam Hossein Cassim* v. *Fatima Begum* (1). Stress has also been laid on the circumstance that the steps contemplated by the Code of Civil Procedure as necessary preliminaries to a valid sale held at the instance of the Court were not taken in this case, because the properties were not attached and the requisite notices were not issued. In our opinion, it is fairly clear, on the proceedings taken in their entirety, that the sale was held by the Court through the agency of the auctioneers. The employment of agents for the conduct of a sale of this description is clearly contemplated by rule 65 of order 21 of the Code which provides that, save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or *by such other person as the Court may appoint in this behalf* and shall be made by public auction in the manner prescribed. In the present case, the person appointed by the Court, under order 21 rule 65 was no doubt the very person nominated by the parties at the time the consent decree was made. It is also true, as observed by Ray, L. J. in the case of *Huddersfield Banking Corporation* v. *Leicester* (2), that a consent order is a mere creature of agreement and carries out the agreement between the parties, or, as Parke, J. puts it in *Wentworth* v. *Buller* (3), the contract is not the less a

(1) (1910) 16 C. W. N. 394. (2) (1895) 2 Ch. 273.
(3) (1829) 9 B. & C. 840.

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contract and subject to the incidents of a contract, because there is superadded the command of a Judge. But it is nevertheless an order of the Court and possesses one at least of the essential characteristics of an order made by a Court of justice, namely, it is an order capable of execution by the Court. In the case before us, the agreement of the parties that the movable properties of the judgment-debtor would be sold by Mackenzie Lyall & Co. was accepted by the Court and embodied in the decree. The inference follows that when, upon the application of the judgment-debtor, the Court instructed Mackenzie Lyall & Co. to hold the sale, the Court took a step in execution and the sale was held in execution by a person appointed by the Court in that behalf. The decision of Fletcher, J. in *Golam* v. *Fatima* (1), does not millitate against this view and is clearly distinguishable; that case only rules that a sale by a receiver is not a sale by the Court for the purpose of grant of a sale certificate. That principle obviously has no application to the case before us. It may be added that if the sale here be treated as a private sale held at the instance of the judgment-debtor by an agent nominated by him, there would be no room for the application of section 73, Civil Procedure Code and the application of Galstaun for rateable distribution could not possibly be entertained. On the first question, we must consequently hold that Mackenzie Lyall & Co., held the sale at the instance of the Court and that the sale was in essence a sale by the Court itself.

The determination of the second question involves the solution of the problem whether receipt of the purchase money by the auctioneers from the purchasers was equivalent to receipt of assets by the Court within the meaning of sub-section (1) of section 73, Code of Civil Procedure. We have been invited to answer this question in the negative on the authority of the decision in *Maharaja of Burdwan* v. *Apurba Krishna Roy* (2). That case is of no assistance in the examination of the question raised before us. The sale there was of immovable property. Under the provisions of the Code, upon such a sale, one-fourth of the purchase money is required to be paid into Court at the time the bid is accepted; the remainder must be brought into Court by the purchaser within a prescribed time. The qustion in controversy was, whether assets could be deemed to have been received by the Court within the meaning of section 73 before the entire purchase money had been paid into Court. The answer was in the negative, for the obvious

(1) (1910) 16 C. W. N. 394.
(2) (1911) 16 C. L. J. 50; 15 C. W. N. 872.

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reason that till the entire purchase money had been brought into Court, there was no complete sale on the basis whereof the sale proceeds could be distributed amongst the rival claimants. It is also clear that rateable distribution in that case was sought, not in respect of the one-fourth share of the purchase money paid into Court at the time of the acceptance of the bid, but of the entire purchase money ; and with reference to a three-forurths share thereof at least, there could be no controversy that the assets were not received till such portion had been paid into Court. The case before us is of an entirely different description. Here, what was sold was movable property and the entire purchase money was paid by the purchasers into the hands of the auctioneers in one instalment. The question thus arises, whether the receipt of the purchase money by the auctioneers was receipt of the assets by the Court. We are clearly of opinion that the answer must be in the affirmative. The policy which underlies section 73 obviously is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained ; that point of time is the moment when the entire purchase money has been paid by the purchasers. It is immaterial, from this point of view, whether the purchase money has been actually paid into the treasury or into the hands of a person employed by the Court to hold the sale. This view is consistent with the elementary principle that when an auctioneer receives the purchase money as the agent of the vendor, it is his duty immediately to account for it and pay over the balance due to the latter. This is in conformity with the decisions in *Crosskey* v. *Mills* (1) and *Gray* v. *Haig* (2). We hold accordingly that the assets in the present case were received by the Court for purposes of section 73 on the 22nd September, 1915 and not on the 15th March, 1916, when the cheque was sent by the auctioneers. It is not necessary for us to enunciate a general principle of universal application that receipt of money by an agent is in all conceivable circumstances, equivalent to receipt of money by the principal. It is sufficient to hold that when a sale has been held by a Court in execution, under order 21, rule 65, receipt of purchase money by the agent is, for purposes of section 73, equivalent to receipt of assets by the Court. In this view, it is plain that the assets were received by the Court, before Galstaun applied for execution of his decree.

We desire to add that the view we take is clearly consistent with

(1) (1834) 1 C. M. & R. 298 ; 3 L. J. Ex. 297.
(2) (1855) 20 Beav. 219.

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the broad justice of the case. It has been conclusively proved that the delay in the transmission of the purchase money by the auctioneers to the Court was due entirely to the action of Galstaun himself. He made an application to this Court on the Original Side with a view to restrain the auctioneers from transmitting the sale proceeds to the Court of the Subordinate Judge. He obtained an *exparte* order to this effect on the allegation that the money was held by them within the jurisdiction of this Court, as agents of his judgment-debtor Sullivan. The Court was subsequently apprised that the *ex parte* order had been obtained on a suppression of the fact that the money was in the hands of the auctioneers not as the agent of Sullivan but as the agents of the Court of the Subordinate Judge, who had directed the sale. The result was that the order was forthwith recalled and the auctioneers transmitted the cheque to the Subordinate Judge without delay. The parties should clearly be placed in the position they would have occupied if the erroneous order had never been made. It would, in our opinion, have been lamentable if in such circumstances we were constrained, upon a narrow construction of section 73, to hold that the petitioner had by recourse to a device succeeded in detaining the money in the hands of the auctioneers for several months and thereby securing an advantage to which he would not otherwise be entitled under the law.

The result is that this Rule is discharged with costs. We assess the hearing fee at five gold mohurs.

A. T. M. *Rule discharged.*

PRIVY COUNCIL.

PRESENT: *Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

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MEHERBAI AND OTHERS.

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November, 9, 10. December, 7.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Vendor and purchaser—Marketable title—Discharge of mortgage—Recitals as evidence—Indian Registration Act (III of 1877).

In 1913 land was agreed to be sold, the vendors to deduce "a marketable title free from all reasonable doubts": In 1892 the land had been mortgaged to two joint mortgagees by an agreement of charge registered under the Indian Registration Act, 1877, the title deeds being deposited with the mortgagees. The vendors as evidence of the discharge of the mortgage produced a certified copy of a release registered under the above Act and dated September 30, 1902. The release was executed by one only of the joint mortgagees, but recited that the other mortgagee was dead and that the executant was his heir, and that the mortgage had been redeemed. The vendors also failed to produce one of the title deeds deposited with the mortgagees:

Held, that the recitals were not evidence against the joint mortgagee, that the provisions of the Indian Registration Act had no effect on the value as evidence of recitals contained in a registered instrument, and that the vendors having refused to supply evidence of the recited facts had not complied with the agreement as to title.

Appeal from a decree of the Bombay High Court, dated November 11, 1914, affirming a decree of Macleod J. dated the 1st August, 1914.

By an agreement for sale dated October 18, 1913, the respondents agreed to sell certain land in Bombay town to appellant. The agreement provided that the vendors should deduce a marketable title to the property free from all reasonable doubts. The purchaser paid 5000 earnest money.

By an agreement of charge dated April 26, 1892, accompanied by deposit of title deeds, the then owners of the property had mortgaged it to Damoderdass Sunderdass and Gordhandass Sunderdass. The vendors alleged that on August 9, 1892, the mortgage had been redeemed by payment of the amount due to the mortgagees, that Damoderdass died on July 4, 1902, leaving Gordhandass his only heir, and that Gordhandass on September 30, 1902, released the property.

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They produced a certified copy of the deed of release, which recited these facts.

The purchaser required evidence of the said facts, and made some further requisitions but the vendors contended that the deed itself was sufficient evidence and did not comply with the other requisitions. The purchaser thereupon cancelled the contract and asked to get back his earnest money, took out an originating summons to determine whether he had rightly cancelled it, but Macleod J. held, that the respondents had made out a marketable title free from reasonable doubt and that appellant's fears were fanciful. A decree to this effect was drawn up and affirmed on appeal by Scott C. J. and Davar J.

Hence this appeal.

W. H. Upjohn K. C., and *Sir W. Garth* for Appellant: The main point is that (1) Damoderdass and Gordhandass were joint mortgagees, and there is no proof of discharge by one of the two. The other points are (2) the abstract of title commences only in 1888 and certain deeds were not produced and (3) the vendors, having certain deeds in their power did not produce them.

As to (1) we were entitled to evidence binding the joint promisee. When a person has made a promise to two persons jointly, the right to claim performance rests with them both during their joint lives: Indian Contract Act, section 45 (See also illustration). Payment to one mortgagee without special authority from the other does not discharge the property: *Matson* v. *Dennis* (1), and *Powell* v. *Brodhurst* (2). The production of the mortgage deed was no proof of the extinguishment of the interest of the deceased joint mortgagee, and no proper evidence of such extinguishment was tendered.

Respondents' case sets up that the charge was extinguished by limitation. This point was not taken below. There may be a question whether article 132 or article 147 of the Indian Limitation Act (IX of 1908) applies. I contend article 147 applies: *Vasudeo Mudaliar* v. *K. S. Srinivasa Pillai* (3). Anyhow it is not fair to force on a purchaser a title depending on whether article 132 or article 147 applies. In any case the vendor should have offered us evidence that the period of limitation has not been extended by acknowledgment or payment under sections 19 and 20 of the Act.

As to forcing on a purchaser a title depending on limitation reference may be made to *Scott* v. *Nixen* (4); *Games* v. *Bonner* (5).

(1) (1864) 4 DeG. J. & S. 345. (2) (1901) 2 Ch. 160.
(3) (1907) L. R. 34 I. A. 186; I. L. R. 30 Mad. 426; 6 C. L. J. 379.
(4) (1843) 4 D. War. 388 (402). (5) (1884) 54 L. J. Ch. 517.

The High Court seems to rely on the fact that the release was registered, but this registration proves only the existence of the document, not the fact of the release; Indian Registration Act, sections 52, 57, 58, 59, 60.

As to (2) the title was deduced for 25 years only and during that period three important deeds are missing. That is not in compliance with the contract which provides for a marketable title free from any reasonable doubt.

As to (3) they are bound to give us production and the information was asked for: Transfer of Property Act, section 55 (1) (*b*) and (*c*).

Cunliffe K. C., and *Raikes* for the Respondents: There is a strict system of registration in Bombay. Since 1866 no document unless registered, can affect immovable property there. Under these circumstances it is unsafe to apply analogies derived from English practice. The contract only requires to deduce such a title as a reasonable minded purchaser would accept. The vendors were ready and willing to satisfy all reasonable requisitions, but the purchaser abruptly broke off.

The mortgage here arose by deposit of deeds, and the purchaser only had to be satisfied that the deeds had gone back to the possession of the mortgagor. The charge is created by the deposit: the memorandum is merely conclusive evidence of the terms of deposit.

There is a presumption as to the reality of deed executed and registered: *Shamchand Pal* v. *Protap Chandra Pal* (1).

Further, the statute of limitations applies; the period is 12 years, which has long since expired. There is nothing to support the supposition that any acknowledgment was given.

No reply was called for.

Their Lordships' judgment was delivered by

Lord Parker of Waddington:—This appeal arises in a vendor and purchaser summons on the original side of the Bombay High Court under rule 210 of the High Court Rules. The vendors were bound by their contract of the 18th October, 1913, to deduce "a marketable title free from all reasonable doubts" to the property they contracted to sell. The question is whether they have discharged this obligation. Both the Judge of first instance and the High Court on appeal have answered this question in the affirmative. The purchaser is now appealing to His Majesty in Council.

December, 7.

(1) (1897) L. R. 24 I. A. 186; I. L. R. 25 Calc. 78.

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The material facts may be stated as follows: On the 26th April, 1892, Ramdass Kessowji, the then owner of the property contracted to be sold, joined with Dwarkadass Shamji, the owner of an adjoining property, in mortgaging both properties to Damoderdass Sunderdass and Gordhandass Sunderdass to secure a lac of rupees, with interest at 7½ per cent. per annum. The mortgage was effected by an agreement of charge duly registered It appears from this agreement that the sum to secure which the mortgage was given was a debt due from the mortgagors to the mortgagees. The title deeds relating to both properties are stated to have been deposited with the mortgagees. The principal debt is made payable by two instalments of 50,000 rupees each on the 30th September, 1892, and the 20th April, 1893, but the mortgagors were entitled to pay each instalment before its due date with interest up to the date of actual payment. Both mortgagors join in charging the properties. The agreement contains a proviso that on payment of either instalment with interest the mortgagors, or either of them, shall be entitled to redeem the title deeds of one of the properties, and that a memorandum of such payment and redemption shall be endorsed on the agreement.

In order to make a title to the property the vendors must show that this mortgage has been cleared off. Their case is that about the 9th August, 1892, Ramdass Kessowji paid to the mortgagees the first instalment of 50,000 rupees with interest, and redeemed the title deeds of the property contracted to be sold. As evidence of this they produce a certified copy of a release, dated the 30th September, 1902 (less than eleven years before the date of the contract), and duly registered, whereby, after reciting such payment and redemption, and also the death of Damoderdass Sunderdass on the 4th July, 1902, leaving Gordhandass Sunderdass his only heir and legal representative, Gordhandass Sunderdass released the property contracted to be sold from the equitable charge created by the agreement of the 26th April, 1892. Obviously if it be the fact that when this release was executed Damoderdass Sunderdass was dead, and Gordhandass Sunderdass was his sole heir and legal representative, the equitable charge was effectually released. The purchaser therefore asked for evidence of these facts, but the vendors refused to supply such evidence on the ground that the recitals in the release itself were sufficient proof of the facts recited.

In their Lordships' opinion, it is quite clear that the recitals in a deed are, strictly speaking, evidence only as against the parties to the deed and those claiming through or under them. If, therefore, at the date of the release Damoderdass Sunderdass were living, or

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if, though dead, Gordhandass were not his heir or legal representative, there would be nothing to prevent either Damoderdass Sunderdass himself or those claiming through him from disputing the truth of the recitals contained in the release. The learned Judges in the Court below appear to have thought that the provisions of the Registration Act, 1877, had some bearing on this point, but if those provisions be referred to it is quite clear that they have no effect on the value as evidence of recitals contained in a registered instrument.

Although, however, recitals in a deed are only evidence as against the parties to the deed or those who claim through or under them, it has long been the custom of conveyancers, at any rate in this country, to provide in contracts of sale and purchase that recitals in deeds of a certain age shall be sufficient to satisfy a purchaser of the truth of the fact recited. The existence of such a custom is material whenever a purchaser is bound to accept a marketable title, for the insertion of a usual condition in a contract of resale could not be depreciatory. In this country the usual condition (now recognised by statute) is confined to deeds dated not less than twenty years before the contract, and there is no evidence of any custom among Bombay conveyancers relating to more recent deeds. In their Lordships' opinion, a condition making the recitals in the release of 1902 evidence of the facts recited would have been depreciatory, especially having regard to the fact that the vendors cannot produce one of the title deeds deposited for the purpose of the equitable charge or the equitable charge itself.

It was argued that Damoderdass Sunderdass, if living, or, if dead, his heirs or legal representative, must be barred by the Limitation Act. This point was not taken in either of the Courts below, and it is doubtful whether it be open to the respondents to take it before this Board. Their Lordships, however, do not consider the point to be a good one. It is perfectly possible that there have been payments on account of the principal or interest secured by the equitable charge which would preclude the operation of the statute.

Their Lordships conclude, therefore, that the purchaser was justified in requiring evidence that Gordhandass Sunderdass was sole heir and legal representative of Damoderdass Sunderdass, and that the vendors having refused to supply such evidence have not deduced the marketable title which they were bound to deduce.

Under these circumstances their Lordships will humbly advise His Majesty to reverse the orders appealed from with costs here

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and below, and to order the return to the purchaser of his deposit with interest at the usual rate allowed in such cases by the Courts in Bombay (or in case the parties differ, at a rate to be fixed by the High Court), and the cost of investigating the vendor's title.

G. C. Farr :—Solicitor for the Appellant.

E. F. Turner & Sons :—Solicitors for the Respondents.

J. M P. *Appeal allowed.*

PRESENT : *Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

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November, 6. December, 18.

HAR CHANDI LAL AND OTHERS

v.

SHEORAJ SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD].

Mortgage—New invalid mortgage—Intention to accept new security frustrated—Performance by third party—Indian Contract Act (IX of 1872), Sec. 41.

In 1876 J. C., a Hindu, mortgaged his share in a village, and in 1879 and 1881 his separated nephew, P. S., gave the same mortgagee two mortgages respectively on the remaining portion of the village being his share in it. In 1887 J. C's. widow and P. S., jointly executed two mortgages one for the amount due under the mortgage of 1876 and the other for the amount due under the mortgages of 1879 and 1881, but making the whole village liable for each debt. The mortgagee obtained the usual mortgage decree against the widow and P. S., both of whom appealed. But on the death of P. S. his appeal was abandoned by his heirs, the respondents, and the suit against the widow was dismissed by the High Court. This decision was upheld by the Judicial Committee before whom on the death of the widow the respondents were brought on record as the heirs of J. C. The mortgagee's decree was executed only as against the share of P. S. The mortgagee brought the present suit to enforce the mortgage of 1876 :

Held, that though the mortgagee's intention at the time of the execution of the deeds of 1887 was to accept a new security in lieu (*inter alia*) of the security of 1876, yet his original intention was entirely frustrated by the fact that the two deeds of 1887 were held not binding on the widow, and it was not consistent with equity and good conscience that the respondents, having successfully maintained that the mortgages of 1887 were not binding on the widow and consequently on

them as the heirs of J. C., should now be permitted to claim the benefit of the transaction of 1887 as a release of the mortgage of 1876; and that nothing had happened to preclude the mortgagee from enforcing the mortgage of 1876 against the respondents.

Section 41 of the Indian Contract Act, which provides for the discharge of a contract by the acceptance of performance by a third party, applies only where the contract has in fact been performed.

The suit was brought by Chatri Lal (since deceased and now represented by the appellant against the respondent, as the heirs of Jai Chand (a Hindoo) upon a mortgage executed by the latter on November 13, 1876, the mortgaged property being a five-sixth share in a village. On March 6, 1879, and September 26, 1881, Phul Singh (a separated nephew of Jai Chand) gave two mortgages respectively to Chatri Lal on the remaining one-sixth share in the village which belonged to him. On September 9, and October 30, 1887, respectively Jai Chand's widow, Musammat Nandan, and Phul Singh executed two mortgages in favour of Chatri Lal, the security in each case being the whole village. The first was for the amount due under the mortgage of Jai Chand and the second for the amount due under the two mortgages of Phul Singh. Chatri Lal's suit to enforce the mortgages of 1887 was decreed against Nandan and Phul Singh, both of whom appealed to the High Court. But on the death of Phul Singh his heirs, the present respondents, abandoned his appeal, and the High Court dismissed the suit against Nandan. This decision was affirmed by the Judicial Committee, before whom on the death of Nandan the respondents were brought on record as the heirs of Jai Chand. The mortgagee executed his decree only as against the one-sixth share of Phul Singh but the amount realized was not sufficient to meet the indebtedness of Phul Singh himself.

The respondents by their written statement submitted *inter alia* that the mortgage of 1876 was discharged by that of 1887, that the claim was merged in the said decree of the Privy Council in 1903, that the mortgage by Nandan of 1887 was not binding upon her, and that the claim was consequently barred under section 11 and order 2 rule 2 of the Code of Civil Procedure, 1908.

The Subordinate Judge decided in favour of the appellants and gave them the usual mortgage decree. But on appeal the High Court, disagreeing with the Subordinate Judge, dismissed the suit. Richards C. J. and Banerji J. held that at the time of the suit the mortgagee was neither possessed of nor entitled to the possession of the mortgage sued on, and that the suit was consequently not maintainable. They further held that the mortgagee must be

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taken to have accepted the performance by Phul Singh of the contract sued on and that under section 41 of the Indian Contract Act, it was thereby discharged. Their reasons were as follows:

"In our opinion the decree of the Court below was wrong. It is impossible now to say exactly who was to blame for the transaction which took place in 1887. It would appear that it was the opinion of this Court when it dismissed the suit brought in 1896 that a fraud had been practised upon Musammat Nandan Kunwar by Phul Singh and the predecessor in title of the plaintiffs. The question in a case of this kind is one of intention. There can be no doubt that it was the intention of Phul Singh and the mortgagee that the new mortgage should supersede and be substituted for the mortgage which is now sued upon, and there can be no doubt that in pursuance of that intention the mortgage bond which is now sued upon was handed over to Phul Singh. In the present suit the plaintiffs were unable to produce the mortgage and had to sue upon a copy. It is quite possible that if the plaintiff had succeeded in 1896, when this Court held that Nandan Kunwar was not liable, in showing that a fraud had been practised upon the mortgagee by Phul Singh, the equities between Phul Singh and the mortgagee might have been in some way adjusted. The mortgagee might have taken a decree against Phul Singh only for the amount due by him and got a declaration that his right under the mortgage now sued on should be revived or he might have taken some steps to recover the mortgage deed or to get a declaration that Phul Singh held it in trust for him. But nothing of this kind was done. A decree for the aggregate amount was obtained against Phul Singh and this decree was put into execution. No step of any kind was taken by the plaintiffs until limitation was on the eve of expiry. In our opinion at the time of the institution of the present suit the plaintiffs were neither possessed of nor entitled to, possession of the mortgage bond sued upon, and under these circumstances we do not think that his representatives were in a position to maintain the present suit. Notwithstanding that the mortgagee did not get all that he thought he was getting at the time of the execution of the new mortgages, we think that he must be held to have accepted the performance of the contract contained in the mortgage now sued upon (i.e., the mortgage of the 13th November 1876) by Phul Singh within the meaning of section 41 of the Contract Act. It is true no doubt that the defendants are the sons of Phul Singh. It must be remembered at the same time that they are in possession of the property, not as the sons of Phul Singh but as the reversioners to the

estate of Jai Chand, upon the death of his widow, Musammat Nandan Kunwar."

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De Gruyther, K. C., and *Dube*, for the Appellants: There was no discharge of the mortgage sued on by a substitution of a new contract under section 62 of the Indian Contract Act. It may have been intended that Nandan's mortgage of 1887 should be in discharge of the mortgage of 1876, but having repudiated her liability under it she could not so contend, and the respondents, who were joined as parties to the Privy Council appeal upon her death, can be in no better position. There was no acceptance of performance by Phul Singh, or in fact any performance by him, so as to amount to a discharge under section 41 of that Act. Section 11 and order 2 rule 2 (2) of the Code of Civil Procedure have no application to the facts of the case.

Sir W. Garth for the Respondents. When the mortgage of 1887 was held not to be binding upon the widow the mortgagee was put to his election either to enforce against her the mortgage of 1876 or to continue to hold Phul Singh liable upon his mortgage of 1887, which affected the whole mouza. He could not rely upon both mortgages. He must be taken to have accepted the liability of Phul Singh upon the decree against the whole property as a performance of the contract by Jai Chand.

Dube in reply. The decree against Phul Singh was only executed against his sixth share of the mauza.

The judgment of their Lordships was delivered by

December, 18.

Lord Parker of Waddington:—This is an appeal from a decree dated the 25th February, 1913, of the High Court (Allahabad), reversing a decree dated the 8th July, 1911, of the Subordinate Judge of Bareilly. The question is whether the appellants are entitled to enforce a mortgage against the respondents.

The mortgage in question is dated the 13th November, 1876, and was executed by Jai Chand in favour of Lala Chatri Lal, the mortgaged property being a five-sixths share in the mauza Nagaria Bikrampur. The amount secured was 5,500 rupees. The mortgagor died leaving a widow, Musammat Nandan, and a separated nephew, Phul Singh. Under the Hindu law Musammat Nandan had a widow's interest and Phul Singh had a reversion contingent on his surviving her in the property subject to the mortgage. Musammat Nandan could dispose of the property with the concurrence of Phul Singh, but Phul Singh could not, without the concurrence of Musammat Nandan, dispose of the reversion so as

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to defeat the interests of those who would become entitled if he died in her lifetime.

Phul Singh was the owner of the remaining one-sixth share in the mauza in question. On the 6th March, 1879, and the 26th September, 1881, he mortgaged his one-sixth in favour of Lala Chatri Lal for 1,000 rupees and 3,000 rupees, respectively, with interest. Obviously, therefore, Lala Chatri Lal had a better security for the 5,500 rupees due on Jai Chand's five-sixths share than he had for the 1,000 rupees and 3,000 rupees due on Phul Singh's one-sixth share. On the 9th September and 30th October, 1887, respectively, Musammat Nandan and Phul Singh, executed or were expressed, to execute two mortgages in favour of Lala Chatri Lal. Each mortgage purported to affect the entire mauza, the first being in respect of the principal and interest due on Jai Chand's mortgage of the 13th November, 1876, and the second being in respect of the principal and interest due on Phul Singh's mortgages of the 6th March, 1879, and the 26th September, 1881. If these mortgages were valid, Lala Chatri Lal would get the security of Jai Chand's property for the indebtedness of Phul Singh, and the security of Phul Singh's property for the indebtedness of Jai Chand.

In the year 1896 the mortgagee instituted a suit on the basis of the two deeds of 1887. The Subordinate Judge decreed the suit in full, so that judgment went for the whole amount of the indebtedness both of Phul Singh and Jai Chand against the entire mauza. Both Phul Singh and Musammat Nandan appealed, but Phul Singh having shortly afterwards died, his appeal was abandoned by his heirs (the first three defendants in the present suit). The appeal of Musammat Nandan however came on for hearing, and was allowed by the High Court. It was held that even if she had in fact executed the deeds of 1887, they were not binding on her. The mortgagee appealed to His Majesty in Council. Musammat Nandan died pending the appeal, and the first three defendants in the present suit as Jai Chand's heirs were made respondents in her place. The appeal was dismissed. The real effect therefore of the deeds of 1887 must be determined on the footing that Musammat Nandan had never been made a party thereto. On this footing, Phul Singh must be taken to have made his own property a security of Jai Chand's indebtedness, and to have tried to make Jai Chand's property a security for his own indebtedness—an attempt which could only succeed if he survived Mussammat Nandan, which event did not happen. It follows that on Musammat Nandan's death the first three defendants succeeded to Jai Chand's property, subject

to the mortgage of the 13th November, 1876, but free from any further charge purported to be created by Phul Singh. The only difficulty is that the High Court, in allowing the appeal of Musammat Nandan, left the order of the Subordinate Judge standing as against Phul Singh. But the first three defendants do not claim Jai Chand's property as heirs of Phul Singh, but as heirs of Jai Chand, and it appears that after Musammat Nandan's death the order of the Subordinate Judge was executed (and, in their Lordships' opinion, rightly executed) only as against Phul Singh's own one-sixth share of the mauza, and not against Jai Chand's five-sixths share. The real question is whether anything has happened to preclude the mortgagee from enforcing the mortgage of the 13th November, 1876, against the first three defendants as the now owners of Jai Chand's five-sixths share.

It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu *(inter alia)* of the security of the 13th November, 1876. Pursuant to this intention, he appears to have handed over the mortgage of the 13th November, 1876, to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Musammat Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Musammat Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of the 13th November, 1876. In their Lordships' opinion, the 41st section of the Indian Contract Act, upon which the High Court relied, has no application to a case like the present. It applies only where a contract has been in fact performed by some person other than the person bound thereby. If the mortgage of the 13th November, 1876, be looked upon as a contract to pay money it cannot be said to have been performed at all, for though Phul Singh's one-sixth share was sold in the suit of 1896, the amount realised was not sufficient to meet the indebtedness of Phul Singh himself. Still less can Phul Singh be said to have performed the contract contained in the mortgage of the 13th November, 1876, if such mortgage be looked on as a contract to give security, for his attempt to create a security on Jai Chand's property admittedly failed. In their Lordships' opinion, therefore, the mortgage of the

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13th November, 1876, was in the events which happened wholly unaffected by the mortgages of 1887.

It being admitted that if the mortgage of the 13th November, 1876, is a subsisting mortgage, it is not statute barred, the appeal succeeds, and the order of the Subordinate Judge ought to be restored with costs here and below. Their Lordships will humbly advise His Majesty accordingly.

T. L. Wilson & Co. :—Solicitor for the Appellants.

Barrow Rojers & Nevill :—Solicitors for the Respondents.

J. M. P. *Appeal allowed.*

APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Newbould.

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May, 31. June, 7.

JADAV CHANDRA SARKAR, ADMINISTRATOR TO THE ESTATE OF LATE DINABANDHU SARKAR

v.

KAILASH CHANDRA SINGHA AND ANOTHER.*

Civil Procedure Code (Act V of 1908), Sec. 11—Res judicata—Co-defendants.

In order that a finding in a case should be *res judicata* between co-defendants, three things are necessary : (1) that there should be a conflict of interest between co-defendants : (2) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit ; and (3) that the judgment should contain a decision of the question raised as between the co-defendants.

Gurdeo Singh v. *Chandrikah Singh* (1) and *Fakir Chand Lallubhai* v. *Nagin Chand Kalidas* (2) followed.

Cottingham v. *Earl of Shrewsbury* (3) referred to.

Appeal by the Defendant.

Suit for recovery of money.

The material facts will appear sufficiently from the judgment.

Babus Sitaram Banerjee and *Gopal Chandra Chuckerbutty* for the Appellant.

* Appeal from Appellate Decree No. 614 of 1914, against the decree of Babu Saroda Prosad Bakshi, Offg. Additional Subordinate Judge of Faridpur, dated the 29th November, 1913, reversing the decree of Babu Lal Behari Chatterjee, Munsiff, 1st Court, at Goalundo, dated the 17th May, 1913.

(1) (1907) I. L. R. 36 Calc. 193 ; 5 C. L. J. 611.
(2) (1915) I. L. R. 40 Bom. 810. (3) (1843) 3 Hare 627.

Babus Sarat Chandra Roy Chowdhury and *Probodh Chandra Roy* for the Respondents.

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C. A. V.

The judgment of the Court was as follows:—

One Janki Saha brought a suit against the plaintiff as defendant No. 1, the defendant No. 1 as defendant No. 2 and the defendant No. 2 as defendant No. 3 for money said to have been borrowed by the said defendants. Defendant No. 3 was made defendant No. 4 as the *gomosta* of the other defendants. The defendants Nos. 1, 2 and 4 denied the loans and defendant No. 3 did not appear. The issues framed were:—

1. Had the defendants alleged transaction with the plaintiffs and did they borrow the sums as stated in the plaint?

2. Is the claim against defendant No. 1 barred by limitation?

3. Are the defendants Nos. 2 and 4 liable to the plaintiffs for the alleged debts?

4. What amount if any can the plaintiffs recover from any and which of the defendants?

It was found that defendant No. 2 was not liable, that defendant No. 4 as a mere *gomosta* was not liable, that defendant No. 1 (the plaintiff in this case) and defendant No. 3 (defendant No. 2 in this case) were liable. The decree was executed against the plaintiff of this case and he satisfied the same and brings this suit for recovery of the decretal amount from defendant No. 1 for self and as executor of his deceased brother on the ground that the money borrowed and decreed in favour of Janki Saha was borrowed for the business of the defendant No. 1 and his deceased brother Dina Bandhu. Defendant No. 2 who was defendant No. 3 in the creditor's suit is the son of defendant No. 1 and Defendant No. 3 who was defendant No. 4 in the former suit is the *gomosta* of the defendants' firm.

The trial Court gave a decree for half the amount claimed against defendant No. 2 who was one of the judgment-debtors under the previous decree and dismissed the suit against the others as barred by limitation. The learned Subordinate Judge on appeal by the plaintiff has decreed the suit in full against defendant No. 1 who appeals before us.

It is contended on his behalf that the suit is barred by the principle of *res judicata*. Now the plaintiff and the defendants were ranged on the same side as co-defendants and the question of the liability of the defendants would be *res judicata* if it was raised and decided as a question as between the plaintiff and them. The

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Courts are generally unwilling to extend the doctrine of *res judicata* to co-defendants and it has been applied where it has been applied with great caution. In the case of *Cottingham* v. *Earl of Shrewsbury* (1), Vice-Chancellor Wigram said, "if a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." In order therefore that a finding in a case should be *res judicata* between co-defendants, three things are necessary (1) that there should be a conflict of interest between co-defendants (2) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit (3) that the judgment should contain a decision of the question raised as between the co-defendants. See *Gurdeo Singh* v. *Chandrikah Singh* (2); *Fakir Chand Lallubhai* v. *Nagin Chand Kalidas* (3). In the previous suit of the creditor the defendants had no conflict; they all denied the claim of the plaintiff so that on the pleadings there was no conflict of interest amongst the defendants; issue No. 3 was framed on the plea of defendants Nos. 2 and 4, who said they were not liable as defendant No. 2 had not taken the loan and had not authorised defendant No. 3 and as defendant No. 4 was a mere *gomosta*. Issue No. 4 was a general one on the said pleas and was intended to decide who were liable to the plaintiff. The decision was that defendant No. 2 was not liable to the plaintiff so that none of the three elements of a *res judicata* between co-defendants is present in the judgment. It is said, however, that the plaintiff ought to have raised the plea that he now raises that he was a mere surety for the others. In the first place such a plea would be inconsistent with the plea that he did take evidently for the benefit of the present defendants in the second place it would not save him from the decree and in the third place it would be unnecessary to decide the question of the liabilities as between the several defendants as the plaintiff claimed a joint decree against all the defendants. On all these grounds we think that the question is not *res judicata*.

The appeal is therefore dismissed with costs.

A. N. R. C. *Appeal dismissed.*

(1) (1843) 3 Hare 627 (638).
(2) (1907) I. L. R. 36 Calc. 193 (214); 5 C. L. J. 611.
(3) (1915) I. L. R. 40 Bom. 210 (216).

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

PANCHCOWRI GHOSE

v.

HARI DAS JOTI AND OTHERS*.

CIVIL. 1916. *May, 10.*

Suit for recovery of money—Deposit—Bengal Tenancy Act (VIII of 1885), Sec. 171—Mortgage—Deed, concocted—Contract Act (IX of 1872), Sec. 70—'Lawfully'—Person benefited by payment.

A mortgagee, whose deed was found to be a forged one and who had not paid any money, is not a person having interest voidable on the sale within the meaning of section 171 of the Bengal Tenancy Act. He is not entitled to realise the amount deposited under the said section 171, either under section 69 or section 70 of the Contract Act.

The word 'lawfully' in section 70 of the Contract Act is not merely a surplusage. It must be considered in each individual case, whether the person, who made the payment, had any interest in making it; if not, the payment cannot be said to have been made 'lawfully'. He must have lawful interest in making it.

Raja Baikunto Nath v. *Udoy* (1) followed.

It is not in every case in which a man was benefited by the money of another that an obligation to repay that money arises. There must be an obligation, express or implied, to repay.

Ram Tuhul v *Biseswar* (2) followed.

Appeal by the Plaintiff, under section 15 of the Letters Patent.

Suit to recover the amount deposited under section 171 of the Bengal Tenancy Act by the plaintiff mortgagee. The suit was decreed in the Courts below. The defendants appealed to the High Court. The appeal came on for hearing before Mr. Justice Coxe, who delivered the following judgment.

1911. *February, 22.*

COXE, J.—The appellants in this case are defendants Nos. 1 and 2. It appears that their landlord obtained a decree for rent against them and put up their holding to sale. The plaintiff alleging himself to be a mortgagee applied to deposit the decretal amount in Court under section 171 of the Tenancy Act. The defendants objected. The execution Court declined to decide the question whether or not the plaintiff was entitled to make the deposit and

* Letters Patent Appeal No. 52 of 1914, against the decision of Mr. Justice Coxe, dated the 22nd February, 1911, in Appeal from Appellate Decree No. 998 of 1909, against the decree of Babu Sri Hari Lahiri, Additional Subordinate Judge of Hooghly, dated the 10th February, 1909, affirming that of Babu Bepin Behary Mukherjee, Munsiff 3rd Court at Howrah, dated the 4th July, 1908.

(1) (1905) 2 C. L. J. 311.
(2) (1875) L. R. 2 I. A. 131; 15 B. L. R. 208.

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directed that the case should be disposed of on full satisfaction. The plaintiff then brought this suit to recover the amount he had deposited from the defendants and has obtained a decree in the Courts below.

It has been argued by the learned pleader for the appellants that the suit was wrongly framed and that a joint decree should not have been given against all the defendants. It is pointed out on the other side that the suit was not one for contribution, and that the decree is in accordance with the pleadings. But in the view that I take of this case it is not necessary for me to go into this question.

The main contention of the defendants is that the deposit was a voluntary payment and that the plaintiff was therefore not entitled to recover it. He relies upon the cases of *Janki Prasad Singh* v. *Baldeo Prasad* (1) and *Yogambal Boyee Ammani* v. *Naina Pillai Markayar* (2); to which I may add the case of *Raja Baikuntho Nath Dey Bahadur* v. *Udoy Chand Maiti* (3). Under section 171 of the Bengal Tenancy Act the persons entitled to make a deposit are persons having any interest voidable upon the sale to avoid which the deposit is made. In the judgments of the Courts below I cannot find any distinct decision that the plaintiff in this case had an interest voidable upon the sale. The plaintiff claimed to be a mortgagee. Neither of the Courts below finds that he had at the time of making this deposit a valid subsisting mortgage. Indeed it would be somewhat difficult for them to come to a finding of that nature inasmuch as in the suit which he brought to enforce his mortgage the Court held, upon the evidence before it that the bond in suit was neither a mortgage bond nor was executed for any consideration. The learned Subordinate Judge and the Munsiff appear to have thought that if a person in good faith believed that he had an interest which would be voidable upon the sale he was entitled to make a deposit under section 171 whether as a matter of fact he had such an interest or not. This, I think, is an erroneous view of law. It has been decided in a case between the parties that the plaintiff had no valid mortgage against the defendants. Under the circumstances he is not, I think, a person entitled to make an application under section 171. Reliance has been placed by the learned Subordinate Judge on sections 69 and 70 of the Contract Act. Section 69 runs "A person who is interested in the payment of money which another is bound by law to pay,

(1) (1908) I. L. R. 30 All. 167.

(2) (1909) I. L. R. 33 Mad. 15. (3) (1905) 2 C. L. J. [illegible]

and who therefore pays it, is entitled to be reimbursed by the other." Here the question is much the same as that arising under section 171 of the Bengal Tenancy Act. Is the plaintiff interested in the payment of the money? If he were a mortgagee he would have an interest in the payment, if he were not he would have no such interest. Section 70 of the Contract Act runs "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former." Here it may be admitted that the plaintiff did something for the defendants and that he did not intend to do this gratuitously. It may perhaps be said that the defendants enjoyed the benefit thereof, though this is by no means so clear inasmuch as he objected to the deposit being made, and, for aught I know, might have preferred that the holding should be sold. In the case of *Yogambal Boyee* v. *Naina Pillai* (1), to which I have already referred it was held that it is necessary that the party sought to be made liable must not only be benefited by the payment but must also have had the opportunity of accepting or rejecting such benefit. Where no such option was left to him and the circumstances did not shew that he intended to take such benefit it was held that he could not be said to have "enjoyed" such benefit within the meaning of the section.

But the real question which arises with regard to section 70 of the Contract Act is whether this deposit was lawfully made by the plaintiff. The learned pleader for the respondent relies on certain remarks of the learned Chief Justice in the case of *Mohendra Ghoshal* v. *Bhuban Mardana* (2). There the learned Chief Justice observed that as the plaintiff in making the deposit which was the subject of that case, had acted with the approval of the Court, what he did—was done lawfully. But it is very difficult to say here that this deposit was necessarily made with the approval of the Court. The Court entirely refused to go into the question whether or not the plaintiff was entitled to make the deposit. His order runs as follows: "As the third party appears on the face of the document to be a mortgagee the amount deposited by him may go to satisfy this decree. As for whether the document is really forged or not or as to whether the third party is really entitled to deposit the money or his deposit amounts to a voluntary payment are questions which would be decided in a regular suit between the judgment-debtor and the third party and cannot be looked into in this

(1) (1909) I. L. R. 33 Mad. 15. (2) (1910) 14 C. W. N. 945.

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execution case." This is an extremely qualified sort of approval and I am not prepared to say that an order of that kind can make the action lawful within the meaning of section 70 of the Contract Act. The word 'lawful' is otherwise defined in the case of *Raja Baikunto Nath Dey Bahadur* v. *Udoy Chand Maiti* (1) to which I have already referred, the head note of which runs as follows. "The word 'lawfully' in section 70 of the Contract Act is not merely surplusage. It must be considered in each individual case whether the person who made the payment, had any interest in making it, if not, the payment cannot be said to have been made lawfully." The learned Subordinate Judge relies on two cases of this Court. The first is *Bama Sundari Dasi* v. *Adhar Chandra Sarkar* (2). That case, however, seems to me, to have no application to the present case inasmuch as the person who there deposited the money was the true owner and certainly had an interest in the matter. The other case is *Bindubashini Dassi* v. *Harendra Lal Roy* (3). In that case too the plaintiff who had deposited the money had then obtained a decree in his favour although further enquiry had been ordered by the High Court. Such a position seems to me entirely different from that of a man who has merely a claim which is subsequently found to be without foundation. The learned pleader for the respondent relies also on the case of *Chandra Sekhar Kar* v. *Nafar Chandra Kundu* (4) where it was held that in a case which does not come within section 69 of the Contract Act the Court should apply the general law—legal and equitable and direct that the defendant who had received certain benefit from the plaintiff should compensate him. That, however, was a very peculiar case. It would be unsafe, in my opinion, to carry the principle laid down beyond the circumstances of that case. Otherwise the enactment of sections 69 and 70 of the Contract Act would appear to be more or less superfluous. It appears to me that the plaintiff had no interest voidable upon the sale and was therefore not entitled to make any deposit under section 171 of the Bengal Tenancy Act. Nor was he interested in the payment of the money within the meaning of section 69 of the Contract Act. Nor, even supposing that the defendant did enjoy any benefit from his deposit, was that deposit lawfully made by him within the meaning of section 70 of the Contract Act? Holding this view I must necessarily hold that the case has been wrongly decided and the appeal should be allowed and the suit dismissed with costs of all Courts.

(1) (1905) 2 C. L. J. 311.
(2) (1894) I. L. R. 22 Calc. 28.
(3) (1897) I. L. R. 25 Calc. 305.
(4) (1906) 4 C. L. J. 555.

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Against this decision, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babus Baidyanath Dutt and Tarakeswar Pal Chowdhury for the Appellant.

Babu Bepin Behari Ghose (Sr.) for the Respondents.

The following judgments were delivered:

Sanderson, C. J.—In this case there has been an appeal from the judgment of Mr. Justice Coxe by the plaintiff, and the circumstances of this case are to my mind somewhat extraordinary: It appears that on the 4th of August 1904, there was alleged to have been made a mortgage by the defendants in this case in favour of the plaintiff of certain property which need not be more specifically described. After that mortgage, the zemindars brought an action against the defendants for rent and obtained a decree, and were proposing to sell the defendants' interest for the purpose of realizing their decree. Subsequently, on the 17th of January, 1907, the plaintiff made a deposit of Rs. 284 in the Court in which the decree by the zemindars had been obtained, and it is for the recovery of that amount that the present suit was brought. The deposit was made under somewhat peculiar circumstances; as has been pointed out by my learned brother Mr. Justice Mookerjee, it was made in the first instance by the plaintiff *ex parte*, then the defendants appeared upon the scene, and objected to the plaintiff making that deposit on the ground, as they alleged, that the plaintiff had no interest in the property, that he was not a mortgagee and that he ought not to have been allowed to make the deposit, and, a note which was made on the record is as follows: "As the third party appears on the face of the document to be a mortgagee the amount deposited by him may go to satisfy this decree. As to whether the document is really forged or not or as to whether the third party is really entitled to deposit the money or his deposit amounts to a voluntary payment are questions which would be decided in a regular suit between the judgment-debtor and the third party and cannot be looked into in this execution case." Therefore, it is obvious to my mind that the defendants, upon this deposit being brought to their notice, put in an objection upon the ground that the plaintiff's alleged mortgage was not a mortgage at all, but that in fact it was a forged document and that the plaintiff had not paid any money, to the defendants in respect of the document.

Now, the first question that arises upon that is whether in those circumstances the plaintiff can be said to be a person who comes

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within section 170, paragraph (3), of the Bengal Tenancy Act, which runs as follows: "The judgment-debtor or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under this section." Now, it appears that when the matter of the validity of the mortgage came to be investigated by the Court in a mortgage suit which the plaintiff brought in 1907, it turned out that the first Court held that it was not satisfied that the defendants had ever executed the mortgage at all and that it was quite satisfied that the plaintiff had not made any payment in respect of the alleged mortgage: and, the second Court to whose decision of course we must have most regard as far as the facts are concerned held that that document was a concocted document. Under those circumstances, and having regard to those facts, the plaintiff being simply a holder of a document which the Court has found to be a concocted document, and he being a person who had advanced no money to the defendants, is it possible for us to say that "he is a person having any interest voidable on the sale." In my judgment, it is sufficient only to state the facts to show that it is not possible for us to say that he is such a person, and therefore he ought not to have been allowed to make the deposit under the procedure provided by section 170 or section 171 of the Bengal Tenancy Act.

Then it is said that the plaintiff comes within either section 69 or section 70 or perhaps both of the Contract Act of 1872. In order to come within section 69, the plaintiff must show that he is 'a person who is interested in the payment of the money which another was bound to pay'; or, if he is to come within section 70 he must be 'a person who lawfully paid for the defendant, not intending to do so gratuitously and that the defendant has enjoyed the benefit of such payment.' In my judgment, having regard to the facts which I have stated he does not come within either. The test as regards the meaning of the word "lawfully" was laid down by my learned brother Mr. Justice Mookerjee in the case of *Raja Baikunto Nath Dey Bahadur* v. *Udoy Chand Maiti* (1):—"The word 'lawfully' in section 70 of the Contract Act is not merely a surplusage. It must be considered in each individual case, whether the person, who made the payment, *had any interest in making it*; if not, the payment cannot be said to have been made 'lawfully'." I expect my learned brother would agree with me, when I say he meant "had any *lawful* interest in making it"; because, having regard to the judgment which was delivered in the mortgage suit, it seems to me that the plaintiff in this case had a very considerable

(1) (1905) 2 C. L. J. 311.

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interest in making this payment; for, his scheme seems to have been that he had brought the adjoining land, and he hoped that if he could get the Court to hold that the forged mortgage was a valid mortgage, and then when the zemindar brought a suit for rent, and the tenant was not able to pay the rent he could step in on the basis of his mortgage, and might thereby obtain possession of the adjoining land and might get that which he desired to obtain:—thereby he certainly had an *interest*, from his own point of view, in making the payment. But in my judgment it must mean *lawful* interest: and, having regard to the facts which I have stated, I do not think that the plaintiff had such an interest.—This is quite sufficient for the decision with regard to section 69, at which the learned Judge has arrived. I do not think that the plaintiff was interested in the payment of money within the meaning of section 69, nor was the payment 'lawful' within the meaning of section 70.

Stress is laid upon the fact that the defendants having had the *benefit* of the payment, they are liable. I am not sure how the matter stands in that respect: But assuming for the sake of argument, that they have benefited by the payment, I think that is not sufficient to bring the case within the meaning of section 70, because it is pointed out by the Privy Council in the case of *Ram Tuhul Singh* v. *Biseswar Lal Sahoo*, (1) and the passage to which I wish to refer being at page 143, that "Even if this were true, it is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay." How can it be said in this case that there was either an express or implied obligation to repay, when the defendants at the first opportunity after it was brought to their knowledge that this deposit was made by the plaintiff, went to the Court to protest against the making of the deposit on the ground that the plaintiff had no interest to make the deposit, and that the mortgage was a forged mortgage? Having regard to those facts it is impossible to say that this payment was made upon the implied undertaking to repay.

On these grounds I think that Mr. Justice Coxe's judgment was correct, and this appeal ought to be dismissed with costs.

Mookerjee, J.—I entirely agree.

A. T. M. *Suit dismissed: L. P. Appeal dismissed.*

(1) (1875) L. R. 2 I. A. 131.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

CIVIL.

1915.

July, 19, 20.

RAMNATH SIL AND ANOTHER

v.

SIBA SUNDARI DEBYA AND ANOTHER.

Ejectment—Service tenant—Tenancy, forfeiture of—Notice to quit, if necessary—Transfer of Property Act (IV of 1882), Sec. 111 cls. (b) and (g).

Where a service tenure was created before the passing of the Transfer of Property Act, the tenant was not entitled to continue in possession when he failed to perform the services and it was competent to the grantor, on the service thus ceasing, to require and take possession of the land without reference to the Court at all: *Sreesh* v. *Madhub* (1) referred to. If, on the other hand, the tenancy was created after the passing of the Act, the position of the parties is to be determined with reference to either cl. (b) or cl. (g) of section 111 of that Act.

A service tenant holds the land on condition that if he refuses to render service, the lease shall determine and thereupon the landlord shall be entitled to re-enter. If the tenant renounces his character as service tenant, by claiming to hold the land at money or produce rent, and denies the title of the landlord to resume the lands, the lease to him determines and no notice is necessary to eject him.

A instituted a suit to eject B, the service tenant, on the ground that his tenancy had been forfeited by reason of his refusal to render service. The suit was withdrawn, with liberty reserved to institute a fresh suit on the same cause of action:

Held, that this was sufficient notice of intent to forfeit within the meaning of cl. (g) of section 111 of the Transfer of Property Act.

Sergeant v. *Nash* (2); *Grimwood* v. *Moss* (3) and *Jones* v. *Carter* (4) referred to.

Clause (g) of section 111 of the Transfer of Property Act does not render it obligatory upon the lessor to serve a notice to quit upon the lessee who has forfeited his tenancy; even a demand for possession is sufficient.

Anandamoyee v. *Lakhi* (5) and *Deo Nandan* v. *Meghu* (6) referred to.

Appeal by the Defendants.

Suit for ejectment.

* Appeal from Appellate Decree No. 2659 of 1913, against the decree of Babu Mohim Chandra Chuckerbati, Subordinate Judge of Dacca, dated the 14th May 1913, modifying that of Babu Narendra Nath Neogi, Munsiff of Manickgunge, dated the 28th September, 1912.

(1) (1857) S. D. A. 1772. (2) (1903) 2 K. B. 304.
(3) (1872) L. R. 7 C. P. 360. (4) (1846) 15 M. & W. 718.
(5) (1906) I. L. R. 33 Calc. 339.
(6) (1906) 5 C. L. J. 181; I. L. R. 34 Calc. 57; 11 C. W. N. 225.

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July, 20.

The material facts and arguments appear from the judgment.

Babu Sasadhar Roy (Jr.) for the Appellants.

Babus Dwarka Nath Chuckerbutty and *Ramani Mohan Chatterjee* for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the defendants in an action in ejectment. The defendants, who are barbers by caste and profession, held the disputed land under the plaintiffs on condition that they would serve them as barbers and enjoy the land in consideration of their service. The plaintiffs seek to eject the defendants on the allegation that they have forfeited the tenancy, as since 1901, they have refused to perform the requisite service. The defendants urged that the tenancy is held at a money rent, that there has been no forfeiture and that they are entitled to a reasonable notice to quit, before they can be evicted. The Courts below have found on the merits in favour of the plaintiffs and have decreed the suit. In our opinion, that decree is manifestly right and cannot be successfully assailed.

As the origin of the tenancy is unknown, two alternative hypotheses have been placed before us. If the tenancy be assumed to have been created before the Transfer of Property Act came into operation, the position of the defendants must be determined with reference to the law as it stood at that time. Now, it was ruled by a Full Bench of the Sudder Court in the case of *Sreesh Chunder* v. *Madhub Mochee* (1), that where the defendant held land for the performance of certain services, he was not entitled to continue in possession when be failed to perform the services and that it was competent to the grantor, on the service thus ceasing, to resume and take possession of the land without reference to the Court at all. This view was confirmed subsequently in the cases of *Hurrogobind* v. *Ramrutno* (2); *Makbul Hossein* v. *Ameer Sheikh* (3) and *Ansar Ali Jemadar* v. *C. E. Grey* (4). Consequently if the law as it stood before the Transfer of Property Act is applied to the case before us, the defendants are liable to be ejected without notice, as they have refused to perform the requisite service. If, on the other hand, the tenancy is assumed to have been created after the Transfer of Property Act came into operation, the position of the parties must be determined with reference to the terms of section 111. Under clause (b) of that section, a lease of immovable

(1) (1857) S. D. A. 1778.
(2) (1878) I. L. R. 4 Calc. 67.
(3) (1897) I. L. R. 25 Calc. 131.
(4) (1905) 2 C. L. J. 403.

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property determines, where such time (that is, the time limited thereby) is limited conditionally on the happening of some event, by the happening of such event. Under clause (g), a lease of immovable property determines by forfeiture in case the lessee breaks an express condition which provides that on breach thereof, the lessor may re-enter or the lease shall become void, if the lessor does some act showing his intention to determine the lease. In our opinion the case falls either within clause (b) or clause (g). A service tenant holds the land on condition that if he refuses to render service the lease shall determine, and thereupon the landlord shall be entitled to re-enter. There can thus be no doubt that if a service tenant renounces his character as service tenant, by claiming to hold the lands at money or produce rent, and denies the title of the landlord to resume the lands, the lease to him determines and no notice is necessary to eject him. It is also plain that if clause (g) be held applicable, the lessors did, in the present case, signify, prior to the institution of the suit, their intention to determine the lease. In 1908, they instituted a suit to eject the defendants on the ground that their tenancy had been forfeited by reason of their refusal to render service ; that suit was withdrawn, with liberty reserved to institute a fresh suit on the same cause of action, This was sufficient notice of intent to forfeit : *Sergeant* v. *Nash* (1) ; *Grimwood* v. *Moss* (2) ; *Jones* v. *Carter* (3)]. As was explained in the case of *Anandamoyee* v. *Lakhi Chandra Mitra* (4), clause (g) of section 111 does not render it obligatory upon the lessor to serve a notice to quit upon the lessee who has forfeited his tenancy ; even a demand for possession is sufficient : *Deo Nandan* v. *Meghu* (5). It is consequently plain that whether the tenancy was created before or after the Transfer of Property Act came into force, the defendants are liable to be ejected without service of notice to quit.

The decree of the Subordinate Judge is accordingly confirmed and this appeal dismissed with costs.

A. T. M. *Appeal dismissed.*

(1) (1903) 2 K. B. 304.
(2) (1872) L. R. 7 C. P. 360.
(3) (1846) 15 M. & W. 718.
(4) (1906) I. L. R. 33 Calc. 339.
(5) (1906) 5 C. L. J. 181 ; I. L. R. 34 Calc. 57 ; 11 C. W. N. 225.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Richardson.

KESHO PROSAD SINGH

v.

SARWAN LAL.*

CIVIL.
1915.
July, 29, 30.

Principal and agent—Agent, obligation of, to render accounts—Limitation Act (IX of 1908), Sch. I, Arts. 64, 89, 115—Accounts rendered—Suit for recovery of specific sum found due on adjustment of accounts—Time, running of.

The obligation of an agent to render an account of his agency and to account for money received by him, is not confined merely to rendering of accounts of what has been done with the moneys, but includes also the payment of any balance which might be found due from him upon taking accounts.

Kalee Kishen v. *Juggut Tara* (1) referred to.

The suit contemplated by article 89 of the Limitation Act, is a suit in which accounts have to be taken. Where an account has been rendered, the article has no application.

Where accounts have been taken and adjusted, and a specific sum has been found due from the agent to the principal, the principal becomes entitled to sue forthwith for recovery of that money; [*Nobin* v. *Suroop* (2); *Bissessur* v. *Kishen* (3); *Umedchand* v. *Shah Bulakidas* (4) and *Dukhi* v. *Mahomed* (5) referred to]; and the position is not altered, even if the agent continues thereafter to hold his office as agent of that principal. To a suit for the enforcement of a claim of this description, for the recovery of a specific sum found due on adjustment of accounts, article 64 or article 115 applies.

Where the debt is, by a simultaneous agreement in writing signed by the agent or his duly authorised agent, made payable at a future time, the period runs from the date when such time arrives.

Appeal by the Plaintiff.

Suit by a principal for recovery of a sum of money from his agent.

The material facts and arguments appear from the judgment.

Babus Provas Chundra Mitter and *Susil Madhub Mullik* for the Appellant.

Babus Akshoy Kumar Banerjee and *Harnandan Sahay* for the Respondent.

* Appeal from Appellate Decree No. 3742 of 1913, against the decision of Ali Ahmad Esq., District Judge of Arrah, dated the 30th July, 1913, affirming that of Babu Atul Chandra Ghosh, Subordinate Judge of Arrah, dated the 1st July, 1912.

(1) (1868) 11 W. R. 76.
(2) (1866) 6 W. R. 328.
(3) (1875) 24 W. R. 440.
(4) (1868) 5 Bom. H. C. R. O. C. J. 16.
(5) (1883) I. L. R. 10 Calc. 284 F. B.

CIVIL.

1915.

Kesho Prosad.
v.
Sarwan Lal.

July, 30.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal in a suit by a principal for recovery of a sum of money from his agent. The plaintiff claims three sums from the defendant, namely, Rs. 785-14 found due on adjustment of the accounts of 1311, Rs. 1867-2-9 alleged to be due on the unadjusted accounts of 1314, and Rs. 661-5-6 said to have been advanced to the defendant. The agency ceased on the 15th October, 1907 and the suit was instituted on the 4th November 1910; but in this connection, it is to be borne in mind that the Court was closed on account of the annual vacation from the 2nd October to the 3rd November 1910. The District Judge has found, with regard to the sum of Rs. 661-5-6, that as the defendant has already accounted for it, the plaintiff is not entitled to relief in respect thereof. As regards the sum of Rs. 1867-2-9, the District Judge has found that the plaintiff is entitled to succeed, and that no questions of limitation arises, as the suit was brought within three years from the date of termination of the agency as required by article 89 of the schedule to the Indian Limitation Act. The only question in controversy, consequently, is, whether the claim for Rs. 785-14 found due on adjustment of the accounts of the year 1311 is barred by limitation. The case for the plaintiff is that the suit in respect of this claim is governed by article 89, while the contention of the defendant is that article 64 applies to this matter. In our opinion, article 89 has no possible application in so far as this portion of the claim is concerned.

Article 89 provides that a suit by a principal against his agent for movable property received by the latter and not accounted for must be instituted within three years from the date when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates. If attention is confined only to the first column of this article, the contention of the appellant may seem plausible; for the argument is that this is a suit by a principal against his agent; it is for recovery of movable property, because it has been ruled that the expression "movable property" includes money; and it is further a suit for recovery of money which has been received by the agent and has not been accounted for, because the agent has not paid to the principal the sum claimed. Now, it need not be disputed, as was explained by Sir Barnes Peacock C. J. in *Kalee Kishen Paul Chowdhry* v. *Juggut Tara* (1), that the obligation of an

(1) (1868) 11 W. R. 76.

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agent to render an account of his agency and to account for money received by him, is not confined merely to rendering of accounts of what has been done with the moneys, but includes also the payment of any balance which might be found due from him upon taking accounts. But when the first column of article 89 is read along with the third column, it becomes plain that the suit contemplated by article 89 is a suit in which accounts have to be taken. The first alternative mentioned in the third column refers to a case where the principal has demanded an account during the continuance of the agency and has met with a refusal; the second alternative refers to a case where an account has not been demanded and presumably has not been rendered. Where an account has been rendered, article 89 has thus no application. In our opinion, it is plain that where accounts have been taken and adjusted, and a specific sum has been found due from the agent to the principal, the principal becomes entitled to sue forthwith for recovery of that money: *Nobin* v. *Suroop* (1); *Bissessur* v. *Kishen* (2); *Umedchand* v. *Shah Bulakidas* (3); *Dukhi Sahu* v. *Mahomed Bhiku* (4); and the position is not altered, even if the agent continues thereafter to hold his office as agent of that principal. To a suit for the enforcement of a claim of this description, for the recovery of a specific sum found due on adjustment of accounts, article 64 or article 115 applies. Article 64 applies to a suit for money payable to the plaintiff as money found to be due from the defendant to the plaintiff on accounts settled between them. Such a suit has to be instituted within three years from the date when the accounts are stated in writing, signed by the defendant or his agent duly authorised in this behalf. There is, however, an important exception to this rule, namely, in the case where the debt is, by a simultaneous agreement in writing signed by the defendant or his duly authorised agent, made payable at a future time, the period runs from the date when such time arrives. In the case before us, it has not been suggested that when the accounts of ₹311 were adjusted, there was a simultaneous agreement, in writing and signed as required by the statute, for payment of the sum due at a future time. Consequently, time ran against the plaintiff from the date when the accounts were adjusted and the statement signed and as the suit has been brought more than three years after such date, the claim is clearly barred by limitation. On the other hand, if we hold, as has been done in

(1) (1866) 6 W. R. 328.
(2) (1875) 24 W. R. 440.
(3) (1868) 5 Bom. H. C. R. O. C. J. 16.
(4) (1883) I. L. R. 10 Calc. 284.

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some cases [*Laycock* v. *Pickles* (1); *Nahanibai* v. *Nathu Bhan* (2): *Tribhovan* v. *Amina* (3); *Zulfikar* v. *Munna Lal* (4); *Amuthu* v. *Muthayya* (5)] that the expression "account stated" applies only where there are reciprocal demands, though a more popular signification was accepted in *Dukhi* v. *Mahomed* (6) and *Manjunatha* v. *Devamma* (7); it is plain that article 115 is applicable, and, in that view also, the claim is barred by limitation, *Jalim* v. *Choonee* (8).

An ingeneous attempt has been made to induce us to hold that the principal appropriated the sum due, from the collection of subsequent years. There is no foundation for this contention. If the sum found due on adjustment had, as a matter of fact been paid by the agent to the principal, the plaintiff would not have included a claim for that sum in his plaint. On the other hand, it is plain that the accounts for the different years were separately adjusted and no claim has been instituted for the years 1312 and 1313, because, presumably, upon accounts taken for those years, nothing was found due from the agent to the principal. The suit is in substance, for recovery of money found due on adjustment of accounts of the year 1311 and alleged to be due for the year 1314. In respect of the latter claim, the suit is governed by article 89, as the accounts have to be taken; in respect of the former claim, the suit is for recovery of a debt found due on adjustment of accounts and is governed by article 64 or article 115. We hold accordingly that the view taken by the District Judge is correct and that his decree must be affirmed. The appeal is dismissed with costs.

A. T. M. *Appeal dismissed.*

(1) (1863) 4 B. and S. 497.
(2) (1883) I. L. R. 7 Bom. 414.
(3) (1885) I. L. R. 9 Bom. 516.
(4) (1880) I. L. R. 3 All. 148.
(5) (1892) I. L. R. 16 Mad. 339.
(6) (1883) I. L. R. 10 Calc. 284.
(7) (1902) I. L. R. 26 Mad. 186.
(8) (1911) 15 C. W. N. 882.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice and Sir Asutosh Mookerjee, Knight, Judge.

CIVIL.

1916.

November, 28.

SETH DOOLY CHAND

v.

MAMUJI MUSAJI AND OTHERS.*

Award—Reference to arbitration by some of the parties interested—Award, if valid as regards parties who joined—Civil Procedure Code (Act V of 1908), Sch. II. Paras, 1, 15.

Before the jurisdiction of the Court to make an order of reference is invoked, there must be an agreement between all the parties interested, that the matter in difference between them shall be referred to arbitration. Consequently, where there is no such agreement between all the parties interested, the Court is not competent to make a valid order of reference. The order of reference is invalid not only against those who have not agreed but also against those who have agreed.

An award made on a reference through the intervention of a Court is invalid if all the parties interested did not join in the submission. It is not even valid as regards those who were parties to the reference.

Parsidh v. *Ghanshyam* (1) approved. *Lal Mohan* v. *Surya Kumar* (2) dissented from.

Appeal by the Plaintiff.

Application to set aside an award.

The material facts are stated in the judgment of Fletcher, J :

January, 31.

Fletcher, J.—This is an application by one Yusuf Musaji Saleji to set aside an award. The suit was instituted by the plaintiff against a large number of defendants for the purpose of recovering certain monies. The present applicant Yusuf Musaji Saleji did not appear in the suit. On the 19th March 1915 on the application of the plaintiff and certain defendants, not including the present applicant, the matter was referred to arbitration in these terms :—"It is ordered that the said order be superseded and it is further ordered that all matters in difference between the parties in this suit, including the question of costs hereof, be referred to the final decision of the named arbitrator who is to make his award in writing and submit the same to this Court together with all proceedings, depositions and exhibits in this suit within three

* Appeal from Original Order No. 48 of 1916, against the order of Mr. Justice Fletcher, sitting on the Original Side, dated the 31st January, 1916.

(1) (1905) 9 C. W. N. 873. (2) (1906) 11 C. W. N. 1152.

CIVIL.
1916.
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Fletcher, J.

months from the date of service upon him of an office copy of this order or within such further time as he may allow himself from time to time by endorsement on the said office copy order, provided that such extension does not exceed the period of three months." The award is sought to be set aside on two grounds :—(1) that the award was invalid as it did not comply with the terms of the said order, (2) on the ground that the reference was not made on the agreement of all the parties interested within the meaning of section 1, second schedule to the Code of Civil Procedure. The second point is the main point to be decided on the hearing of this motion. The words in the present section do materially differ from the words in the old Code, and the question is whether in this case all the parties interested joined in the application for a reference. The present applicant clearly did not. The suit was proceeding against him *exparte*, and if the view of Mr. S. Ghose who appears for the plaintiff is right, then the suit might have proceeded to trial as an undefended suit against the defendant Yusuf Musaji Saleji who was served but who did not appear. The authority on the point in this Court practically comes to nothing. The best case that has been cited by Mr. Ghose is the case of *Ishar Dass* v. *Keshab Deo* (1). That decision, if it is rightly decided, carries Mr. Ghose's argument a long way. That decision I do not think, is right. The case in the Allahabad Court has received a Judicial notice, and that notice is not favourable. The case of *Haswa* v. *Mahbub* (2) has been referred to. That was a decision on a second appeal. It is pointed out by the learned Judges in the Allahabad Court that Knox and Banerjee JJ had adopted the same view in a regular appeal. The case as put forward by the learned Judges is this, that if we adopt the view that has been put forward, you would have two trials, (1) trial before the arbitrator (2) trial of an undefended suit against the defendant who was not a party to the reference to arbitration. That, of course, was never intended by the Code of Civil Procedure. In the present case Yusuf Musaji Saleji was in fact a party interested (who did not agree to the reference to arbitration) and so much is he a person interested, that the arbitrator has passed a decree against him with others. He obviously was a person interested. I think the reference to arbitration was not on the agreement of all the parties interested, and therefore the reference was invalid. The other point has been as to the award being made out of time. I think not only the fact

(1) (1910) I. L. R. 32 All. 657. (2) (1911) 8 A. L. J. 645.

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that the award was filed before the Registrar on the 14th December, but also the evidence shows that the arbitrator submitted the award within time. That is a technical point, although it is taken by the present applicant. Then another point has been made that the present applicant is out of time, and article 158 of the Limitation Act applies to this application. That depends, as to whether article 158 does apply to this case. This is a case where the award is illegal. The order for reference was invalid, and therefore the award itself was not properly made. It is argued that in a case like this where Yusuf was ignorant of the fact of the reference to arbitration and knew nothing about it, he is bound according to article 158 and must make his application to set aside the award within the 10 days. I do not think that is the meaning of article 158. The present application, therefore, ought to be assented to, and the Court ought to decide that the reference to arbitration was not made on the agreement of all parties interested and that the present application is made within time. The award must be set aside.

Against this judgment, the plaintiff appealed.

Messrs. N. Sarkar & S. Ghose for the Plaintiff Appellant.

Sir S. P. Sinha & Mr. C. C. Ghose for Defendants 6 and 8, Respondents.

Mr. B. L. Mitter for the Defendant 5 Respondent.

Messrs. B. C. Mitter & S. C. Roy for the Defendants 1, 2 and 3, Respondent.

The following judgement were delivered

November, 28.

Sanderson, C. J.—In this case the action was brought by the plaintiff against certain persons who were the members of a partnership, one of whom was called Yusuff Musaji, for recovering certain monies. Yusuff Musaji did not appear in the suit. During the course of the proceedings an order was made on the 19th of March 1915, "that all matters in difference between the parties in this suit including the question of costs thereof be referred to the final decision of Tribhuban Hira Chand of No. 9 Amratolla Street in the town of Calcutta who is to make his award in writing and submit the same to this Court together with all proceedings depositions and exhibits in this suit within three months."

This order was made by the consent of the defendants with the exception of two, whose consent had not been obtained, and one of these two defendants was Yusuff Musaji Saleji. In pursuance of that order the arbitrator entered upon the arbitration and made his award which was filed on the 22nd of December 1915. In that award he

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found and awarded that the plaintiff was entitled to a decree against the defendants for the sum of Rs. 6,900. It is to be noticed that in making his award, he awarded not only against those defendants who had consented to the order of reference being made, but also against the two defendants one of whom was Yusoof Musaji who had not consented to the order of reference. Yusoof made an application on the 12th of January 1916, to the learned Judge sitting on the original side, asking that the award should be set aside: and, the learned Judge after hearing the parties came to the conclusion that the award should be set aside, and the form of the decree which was drawn up in pursuance of his judgment was that the award should be taken off the file and that it should be set aside. The basis of the learned Judge's judgment was that inasmuch as that this was an arbitration undertaken under the order of the Court, that order being made under the provisions contained in the second schedule of the Civil Procedure Code, it could not be a valid reference, unless all the parties interested had agreed to it.

Now, two main grounds have been argued before us. The learned counsel for the appellant has argued *first* that even if all the parties interested in the matter had not consented to the order, that did not make the reference invalid or illegal as regards those defendants who had consented to the reference. This is the first point I intend to deal with in my judgment.

Now, the words of the clause (clause 1 of section 1) in the second schedule are as follows: "Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference." In my judgment that clause means this—Before the Court can have jurisdiction to make an order of reference under that clause, all the parties interested must agree; and if all the parties interested do not agree, then the Court has no jurisdiction to make the order of reference and the order of reference is invalid not only against those who have not agreed but also against those who have agreed. Then the question arises whether the applicant in this case, Yusoof, was a party who was interested. As I have already said, it was an action brought against Yusoof and other defendants, who were members of this partnership. I do not think I am wronging the learned counsel for the appellant when I say that he really did not attempt to argue that Yusoof was not an interested party. Yusoof, obviously, was one who was a defendant in the action and who was alleged to be a member of the firm: and, the fact that the arbitrator had

included him in the award as one of the persons who was to pay the sum of Rs. 6,900 to the plaintiff is pretty cogent evidence that Yusoof was a party interested in the subject matter of the dispute. Therefore, it is clear, that all the parties interested within the meaning of this clause did not agree, and therefore the Court had no jurisdiction to make the order of reference under that clause. Therefore, the reference was invalid.

We have had our attention drawn to two cases; *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (1) and *Lal Mohan Pal* v. *Surya Kumar Das* (2), and I agree with the learned counsel that those decisions are inconsistent: and, if it is necessary for me to express an opinion, I think that the decision which was arrived at in the earlier case, namely, *Parsidh Narain* v, *Ghanshyam Narain* (1) was a correct decision, and the later one was an incorrect decision. It is possible that the decision in the later case may have been based upon more than one ground, but certainly one of the grounds was inconsistent with the judgment in the case of *Parsidh Narain* v. *Ghanshyam Narain* (1). In point of principle, and having regard to the words of the clause, as I have already said, I have no doubt whatever that the conclusion we ought to come to is that inasmuch as all the parties did not agree, the Court had no jurisdiction to make the order of reference. But that does not conclude the matter, because the learned counsel for the appellant with great ingenuity has argued that even if the order referring the matter was invalid, still the judgment of the learned Judge, in so far as it directed that the award should be set aside was not a correct judgment, and that his judgment ought to be limited merely to the direction that the award should be taken off the file: and his argument was based upon this consideration. He said that assuming for the sake of argument that the reference under the order made by the Court was invalid still it may very well be that there was an agreement between the plaintiff and some of the defendants that the matters in dispute between them, at all events those parties who were parties to the petition, should be referred to arbitration, and quite independent of the Civil Procedure Code and the schedule, that would be a good and valid reference to arbitration, and the parties would be left to enforce the rights which they may have, independently of the provisions of the Civil Procedure Code. That depends upon what the parties did agree to: Having heard the argument of the learned counsel for the appellant and also for the respondent, I have come to the conclusion on the materials

(1) (1905) 9 C. W. N. 873. (2) (1906) 11 C. W. N. 1152.

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before us, the only agreement which was arrived at between the parties was an agreement that an application should be made to the Court for an order of reference: and, in pursuance of that order of reference they should go to arbitration in respect of all matters in dispute. There is nothing before us upon which we can infer that there was an agreement to refer which was to be carried out independently of the application to Court. To my mind, the fact that there was an application to the Court based upon the petition to which our attention was drawn was cogent evidence that it was a material and essential part of the agreement that an application to the Court should be made for an order of reference. That being so, the result follows that the only agreement being that an application should be made for an order of reference and thereupon all the questions in dispute should be decided by the gentleman whose name was included in the order of reference, it was a reference under the Act and under the Act alone. As I have said before, by reason of the fact that all the parties did not join in the application or did not agree to it, this was an invalid reference. Therefore, the learned Judge was right in ordering that not only should the award be taken off the file but that it should be set aside.

Our attention has been drawn to section 15 of the schedule which is headed "Grounds for setting aside award." In that section there are mentioned three grounds which I need not refer to, and it was argued that the intention of the Act was that under the Act the award should be set aside upon one of those three grounds only and that the learned Judge not having one of those grounds proved before him had no jurisdiction to set aside the award, and that his jurisdiction was confined to ordering the award to be taken off the file. The observation I have to make is that section 15 obviously was intended to apply to the case where there has been a valid reference, and then, there having been a valid reference, if there is corruption or misconduct of the arbitrator or umpire, that is one of the grounds for setting aside the award: or, if either party has been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator or umpire, that is another ground for setting aside the award: or, if the award has been made after the issue of an order by the Court superseding the arbitration, and so on, that is the third ground for setting aside the award. All these grounds shew that the Act was contemplating in the first instance a valid reference. But as I have said in my judgment there was no valid reference in this case.

For these reasons I think that the learned Judge's judgment was right and this appeal should be dismissed with costs.

Mookerjee, J.—I agree that the order made by Mr. Justice Fletcher should not be disturbed.

The substantial question for determination relates to the validity of an award made on a reference, in contravention of the provisions of paragraph 1 of the second schedule of the Civil Procedure Code, 1908. That paragraph is in these terms: "Where, in any suit, *all the parties interested* agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference." It is plain that before the jurisdiction of the Court to make an order of reference is invoked, there must be an agreement, between all the parties interested, that the matter in difference between them shall be referred to arbitration Consequently, where there is no such agreement between *all* the parties interested, the Court is not competent to make a valid order of reference. In this case, it is not disputed that two of the defendants were not parties to the agreement. This was apparently overlooked at the time the application was made to the Court; the reference was made and was followed by an award in due course. This award has been set aside in its entirety and not merely as regards the persons who were not parties to the agreement. It has not been seriously disputed that the award has no operation as against the parties who did not consent to the reference; the only substantial contention is that the award, though inoperative under the provisions of the second schedule to the Civil Procedure Code, may possibly have vitality independently thereof, and that, consequently, the Court should not have set aside the award in its entirety. In my opinion there is no foundation for this argument.

It is plain that if there is no valid agreement to form the basis of a reference in the terms of paragraph 1 of the second schedule to the Code, there is no valid award whereon a decree can be based in accordance with paragraph 16. Reference, however, has been made to paragraph 15 to show that this is not expressly mentioned as one of the grounds on which the Court can be invited to set aside the award. This may be conceded; but paragragh 15 obviously assumes a valid reference to arbitration, and only contemplates cases where the propriety of an award on the basis of such a reference is in question. Where, however, the jurisdiction of the Court is called in question, the Court has jurisdiction to

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decide that it has acted in contravention of the statute and consequently without jurisdiction: *Rashmoni* v. *Ganada Sundari* (1). The case before us is of that description. I am further of opinion that the intention of the parties to the reference in this case was that there should be a reference to arbitration through the intervention of the Court; they never intended that there should be an arbitration independently of the Court. Consequently there is no substance in the ingenious argument that the award should not have been set aside in its entirety but should only have been taken off the file. This conclusion is obvious upon a plain reading of the provisions of the statute. The judicial decisions on the matter, however, are in a state of considerable confusion; and reliance has been placed on behalf of the appellant upon the case of *Lal Mohan Pal* v. *Surya Kumar Das* (2) which, if correctly decided does assist his argument. This renders necessary a brief review of the authorities relevant to the point.

The earliest decisions in this Court, namely, *Shitanath* v. *Kishen Mohun* (3), *Ram Soondur Mookerjee* v. *Ram Shurun Mookerjee* (4), *Doorga Churn Thakoor* v. *Kally Doss Hazrah* (5), and *Bishoka* v. *Anunto Lall* (6) support the proposition that on the basis of a reference to which all the parties to a litigation have not consented, an award may be made so as to be valid and operative as between the parties to the submission. This view was questioned, and, in my opinion, was correctly questioned, in *Joy Prokash Lal* v. *Sheo Golam Singh* (7), though the Court confirmed the award in that case notwithstanding that some of the parties to the suit did not join in the reference. Later on, in the case of *Parsidh Narain Singh* v. *Ghanshyam Narain* (8), this Court, without reference to the earlier decisions, came to the conclusion that an award based on a reference made under such circumstances was invalid in its entirety. The question was next raised in the case of *Chairman of the Purnea Municipality* v. *Siva Sankar Ram* (9) but was left open for consideration. Subsequently, in *Lal Mohan Pal* v. *Surya Kumar Das* (2), the Court took a contrary view, although one member of the Bench was a party to the decision in *Parsidh Narain Singh* v. *Ghanshyam Narain* (8). In my opinion, the view taken by this Court in the case of *Parsidh Naraain Singh* v. *Ghanshyam Narain* (8) is

(1) (1914) 20 C. L. J. 213 (217).
(2) (1906) 11 C. W. N. 1152.
(3) (1866) 5 W. R. 130.
(4) (1866) 6 W. R. 25.
(5) (1868) 10 W. R. 463.
(6) (1879) 4 C. L. R. 65.
(7) (1884) I. L. R. 11 Calc. 37.
(8) (1905) 9 C. W.N. 873.
(9) (1906) I. L. R. 33 Calc. 899.

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correct and is supported by the decision of the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan* (1). In that case, Lord Macnaghten analysed the provisions of chapter XXXVII of the Code of Civil Procedure of 1882 which corresponds substantially with the second schedule of the present Code. He explained that the Code deals with arbitration under three heads: *first*, submission in pending suits through the intervention of the Court; *secondly*, submission while no suit is pending, but subsequently brought into Court; and, *thirdly*, submission and arbitration thereon without the intervention of the Court. As regards the first of these classes of cases, Lord Macnaghten pointed out that the Court makes an order of reference on an agreement *which must be the agreement of all the parties to the suit* and fixes a time for the delivery of the award with power to enlarge the time. As regards the second and third classes of cases, Lord Macnaghten proceeded to observe that "there is a fundamental difference between these two classes and the first class which does not seem to have been always kept in view in the Courts in India. In the cases falling under the first head, the agreement to refer and the application to the Court founded upon it, *must have the concurrence of all parties concerned* and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to that point." This distinction was emphasised in the case of *Jadu Nath Chowdhury* v. *Kailas Chunder Bhattacharjee* (2), where an award was upheld, although all the persons interested were not parties to the submission, as the reference had been made without the intervention of the Court. In my opinion, there is no possible room for doubt as to the fundamental nature of the condition imposed by the legislature in the first paragraph of the second schedule to the Code. This accords with the view adopted and applied by the Madras High Court in *Indur Subbarami Reddy* v. *Kandadai Rajamannar Ayyangar* (3) and *Rungaswami* v. *Swami* (4). In the Allahabad High Court, however, there has been a remarkable absence of unanimity of opinion. As early as 1887, that Court decided, in the case of *Deonandan* v. *Bhirgu Rai* (5), that an award made on a reference through the intervention of a Court was invalid if all the parties interested did not join in the submission. This opinion, was discarded in the

(1) (1901) I. L. R. 29 Calc. 167.
(2) (1909) 10 C. L. J. 41; 14 C. W. N. 71.
(3) (1902) I. L. R. 26 Mad. 47. (4) (1907) 17 M. L. J. 394.
(5) (1887) 7 All. W. N. 215.

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case of *Pitam Mal* v. *Sadiq Ali* (1) and the expression "all the parties" was interpreted to mean "all the parties who had indicated their interests in the litigation by their presence in the Court." This view, was however, abandoned shortly afterwards in *Kadhu Singh* v *Baljit Singh* (2). But there was a swing of the pendulum the other way in the case of *Ishar* v. *Keshab* (3). Since then, the Allahabad High Court, in *Haswa* v. *Mahbub* (4) has adopted the view taken in *Parsidh* v. *Ghansyam* (5), and the latest decision in *Sabta* v. *Dharam* (6) points to the same conclusion.

In this diversity of judicial opinion, I do not feel pressed by the cases which support the view contrary to what I take and I prefer to interpret the clear provisions of the statute and to give effect to them. On such interpretation, there can be no doubt that the award in this case was inoperative because based on a reference not contemplated by the Code and has been rightly set aside. The true view is that this is a case not of an improper award but of an invalid reference to arbitration. The entire foundation of the jurisdiction of the Court is removed as soon as it is established that the parties have failed to comply with the fundamental requirement of the statute embodied in the first paragraph of the second schedule of the Civil Procedure Code.

On this ground I agree that the order of Mr. Justice Fletcher should be affirmed and this appeal dismissed with costs.

Messrs. K. N. Mitter and *Survadhicary* :—Attorneys for the Appellant.

Messrs Manual Agarwalla & De, *J. C. Dutt Esq*, and *Messrs, Doss & Bose* :—Attorneys for Respondents.

A. T. M. *Appeal dismissed.*

(1) (1898) I. L. R. 24 All. 229.
(2) (1907) I. L. R. 29 All. 423.
(3) (1910) I. L. R. 32 All 657.
(4) (1911) 8 A. L. J. 645.
(5) (1905) 9 C. W. N. 873.
(6) (1912) I. L. R. 35 All. 107.

CRIMINAL REVISION.

Before Sir Lancelot Sanderson, Kt., K. C. Chief Justice, and Mr. Justice Walmsley.

CRIMINAL.

1916.

August, 4.

CHANDRA MANDAL AND OTHERS

v.

RAM MANDAL AND OTHERS.*

Criminal Procedure Code (Act V of 1898), Secs., 133, 137—Arbitration—Magistrate, if can arbitrate—Local enquiry—Proceedings, if can be disposed of without evidence—Finding as to bona fide *claim of right, if essential.*

Section 137 of the Code of Criminal Procedure is imperative and mandatory.

Where, therefore, in a proceeding under section 133 of the Code of Criminal Procedure, a Magistrate was asked by the parties to arbitrate, and he accordingly passed an order after a local enquiry :

Held, the order was illegal, inasmuch as the Magistrate was not justified in assuming the role of an arbitrator because both the parties agreed to his being so, but he should have recorded evidence on the matter of the complaint as in a summons case, and then disposed of the case.

Held also, in the absence of a finding by the Magistrate as to the *bona fides* or speciosity of the claim of the petitioners to the subject matter of the dispute, the judgment was liable to be set aside.

Criminal Reference.

The material facts will appear sufficiently from the following Letter of Reference by the Sessions Judge to the Registrar of the High Court.

Sir,

Under section 438 Criminal Procedure Code I herewith transmit the record of the case noted in the margin to be laid before the High Court with the following report :—

(1) *A brief analysis of the case.*

The Sub-Divisional Magistrate of Narail passed a conditional order on the petitioners to show cause why they should not remove the huts erected by them from a pathway lawfully used by the public. They appeared and showed cause. Neither party however adduced any evidence. The Sub-Divisional Magistrate was asked to arbitrate. He made the order absolute after a local enquiry on the 24th of May last.

(2) *The order recommended for revision.*

* Criminal Revision No. 111 of 1916, upon a Reference under section 438 of the Code of Criminal Procedure by P. K. Chatterjee Esq., Sessions Judge of Jessore, for setting aside an order passed by Babu J. C. Chowdhury, Sub-Divisional Magistrate of Narail, dated 24th May, 1916.

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The order by which the conditional order for removal of obstruction was made absolute.

(3) *In what particular portion of that order the Court making the reference considers an error on a point of law to exist.*

The whole order. Section 137 Criminal Procedure Code, though imperative in its character, was not followed.

(4) *The grounds on which in the opinion of this Court the order should be reversed.*

(*a*) The learned Sub Divisional Magistrate did not follow the procedure laid down in section 137 Criminal Procedure Code. When the petitioners appeared and showed cause, when they alleged that what was claimed as a public pathway was not so, when they urged it was a part of their homestead, the learned Magistrate should have recorded evidence on the matter of the complaint as in a summons case. Section 137 Criminal Procedure Code is imperative and mandatory. He was not justified in assuming the role of an arbitrator, because both the parties agreed to his being so. When the parties wished him to blink at law, he should not have readily agreed to it. Consent of parties or waiver did not vest him with jurisdiction. There is ample aurhority in support of this view: See *Upendra Nath Mandal* v. *Rampal* (1) and *Paresh Nath Biswas* v. *The Emperor* (2). The order was illegally made absolute therefore.

(*b*) It does not appear that the learned Sub-Divisional Magistrate inquired at the outset into the *bona fides* or speciosity of the claim of the petitioners. He should have clearly inquired and found whether the petitioners urged a *bona fide* claim or elaborated a mere pretence to oust him of jurisdiction. This was absolutely necessary: see *Manipur Dey* v *Bidhu Bhusan Sarkar* (3) and *Rakhal Chandra Shaha* v. *Kailash Chandra Sarkar* (4). The Magistrate now urges in his explanation that when he found the pathway a public thoroughfare, it necessarily followed that he held the claim of the petitioners to be a mere pretence. I do not think such an inference is always justifiable. The petitioners may have honestly, though mistakenly believed in the truth of the claim they put forward (see section 3, clause 20 of Act X of 1897). It is moreover not open to the Magistrate to add, by his explanation to the order complained of: See *Madhu Sudan Das* v. *Sasti Prosad Nandy* (5).

On both these grounds, I am of opinion that the Magistrate

(1) (1909) 10 C. L. J. 482.
(2) (1909) 13 C. W. N. 253 (notes).
(3) (1914) 18 C. W. N. 1086.
(4) (1902) 7 C. W. N. 117.
(5) (1903) 7 C. W. N. 859.

illegally made the conditional order absolute. I recommend its reversal. CRIMINAL. 1916. Chandra v. Ram.

The explanation of the Sub-Divisional Magistrate has been placed on the record.

Babu Hemendra Chandra Sen for the Petitioners.

No one for the Opposite Party.

The judgment of the Court was delivered by

August, 4.

Sanderson, C. J.—We accept the Reference; and, in the result, the order is quashed.

A. N. R. C. *Reference accepted, Order quashed.*

APPELLATE CIVIL.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Sheepshanks.

CIVIL. 1916. *August, 15, 30.*

SRIMATI NARAYANI AND ANOTHER

v.

NABIN CHANDRA CHAUDHURI.*

Non-transferable occupancy holding, transfer of—Landlord's consent, effect of—Full Bench decision, Dayamayi's case, principles of.

Held, the Full Bench decision in *Dayamayi* v. *Ananda Mohan Roy Chowdhuri* (1) by implication holds that the raiyat is entitled to have a sale of the holding in execution of a money decree set aside after it takes place, and that the holding cannot be sold in execution of such a decree where the raiyat objects to the sale before it takes place.

Badarennessa Chowdhurani v. *Alam Gazi* (2) followed.

Held further, the Full Bench also impliedly lays down that a sale of an occupancy holding cannot be held in execution of a money-decree if the tenant objects to the sale, although the decree-holder has obtained the consent of the landlord. In the case of a non-transferable holding, as the raiyat cannot confer a title upon the purchaser without the consent of the landlord, so the landlord alone by his own act and without the concurrence of the raiyat cannot create a

* Appeal from Order No. 412 of 1915, against the order of S. E. Stinton Esq., District Judge of Chittagong, dated the 17th May, 1915, affirming that of S. C. De Esq., Munsif at Patiya, dated the 23rd December, 1914.

(1) (1914) 20 C. L. J. 52. (2) (1915) 21 C. L. J. 650.

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title in the purchaser. The two must concur in order that the transfer may be valid. This, however, does not apply to a sale held in execution of a decree founded on a mortgage or charge voluntarily made by the raiyat in which case the transfer though involuntary is operative against the raiyat.

The principle laid down in the case of *Ananda Das* v. *Rutnakar Panda* (1) and *Shakaruddin Choudry* v. *Rani Hemangini Dasi* (2) is no longer good law.

Appeal by the Judgment-debtors.

The decree-holder attached certain non-transferable raiyati holdings belonging to the judgment-debtors in execution of a money decree obtained against them. The judgment-debtors objected to the attachment and sale on the ground that they were not transferable. Two plots being homestead were released from attachment by the executing Court. The attachment of three other plots was maintained as the 16 annas landlords had given their consent to the attachment and sale. As regards the remaining two plots the 10 annas 8 pies landlords had consented to the attachment and sale, and the attachment was consequently confirmed to the extent of their share and withdrawn as regards the remaining 5 annas 4 pies.

Against the order passed by the executing Court the judgment-debtors preferred an appeal to the District Judge, and the learned District Judge affirmed the decision of the executing Court. Against that decision the judgment-debtors preferred an appeal to the High Court.

Babu Kshitish Chandra Sen for the Appellants.

Babus Jogesh Chandra Roy and *Chandra Sekhar Sen* for the Respondent.

C. A. V.

The judgment of the Court was as follows:

August, 30.

This appeal arises out of proceedings in execution of a decree. The decree-holder respondent in execution of a decree for money attached certain raiyati holdings belonging to the judgment-debtor. He obtained the consent of the entire body of landlords to the attachment and sale of some of the holdings, and with regard to some others he obtained the consent of the landlords representing a 10 as. 8 pies share. The judgment-debtors objected to the attachment and sale on the ground that they are not transferable. The holdings have been found to be non-transferable, but the Court of appeal below has over-ruled the objection holding that a "non-transferable holding may of course be attached with the consent of

(1) (1903) 7 C. W. N. 572. (2) (1911) 16 C. W. N. 420.

the landlords and in the case of fractional landlords to the extent of their share." The judgment-debtor has appealed to this Court.

Now, the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (1) have laid down that an involuntary transfer *i.e.*, a sale in execution of a money decree, of the whole or part of an occupancy holding apart from custom or local usage, is operative against the raiyat where the raiyat with knowledge fails or omits to have the sale set aside. As pointed out in *Badarennessa Chowdhurani* v. *Alam Gazi* (2) the question of the omission or failure to set aside the sale with knowledge thereof becomes material only where the sale is invalid and the raiyat has a right to object to it. The Full Bench decision therefore by implication holds that the raiyat is entitled to have a sale of the holding in execution of a money decree set aside after it takes place, and that the holding cannot be sold in execution of such a decree where the raiyat objects to the sale before it takes place.

Before the Full Bench decision it was held that a sale in execution of a money decree of an occupancy holding is valid and effectual if the sale is held with the consent of the landlord [see *Ananda Das* v. *Rutnakar Panda* (3)], and that even a share of a holding can be sold with the consent of the co-sharer landlords to the extent of their share (see *Shakaruddin Choudhry* v. *Rani Hemangini Dasi* (4)). But the view taken in those cases can no longer be maintained having regard to the decision of the Full Bench, which as stated above, impliedly lay down that a sale of an occupancy holding cannot be held in execution of a money decree if the tenant objects to the sale. It is true the decree-holder has obtained the consent of the landlords. But in the case of a non-transferable holding, as the raiyat cannot confer a title upon the purchaser without the consent of the landlord, so the landlord alone by his own act and without the concurrence of the raiyat cannot create a title in the purchaser. The two must concur in order that the transfer may be valid. Having regard to the view taken by the Full Bench as to involuntary transfers, we are unable to hold that the entire holding or a part of it can be sold in execution of a money decree if the raiyat objects to the sale, even if the landlords give their consent to such sale. It is needless to point out that this does not apply to a sale held in execution of a decree founded on a mortgage or charge voluntarily made by the

(1) (1914) 20 C. L. J. 52. (2) (1915) 21 C. L. J. 650.
(3) (1903) 7 C. W. N. 572. (4) (1911) 16 C. W. N. 420.

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raiyat in which case the transfer though involuntary is operative against the raiyat as expressly laid down by the Full Bench.

The appeal must accordingly be allowed, and the orders of the Courts below set aside.

We make no order as to costs.

A. N. R. C. *Appeal allowed.*

Before Mr. Justice Richardson and Mr. Justice Roe.

CIVIL.
1916.
January, 12, 19.
1915.
December, 8.

GOBIND CHANDRA PAL AND OTHERS
v.
KAILASH CHANDRA PAL.*

Security bond, decree on—Money decree—Lien—Execution—Charged properties, sale of—Lien, suit on—Civil Procedure Code (Act V of 1908), Order XXXIV, Rr. 14, 15—Contribution—Valuation of properties, how to be ascertained.

A money decree obtained on a security bond and declaring the existence of a lien on the properties covered by the bond, cannot be executed by the sale of the properties over which the lien was declared by the decree, inasmuch as the properties charged cannot be sold except under a decree under which the chargee has had the opportunity to redeem the charge within a fixed period.

The only course of the decree-holder is to institute a suit on the lien declared by the decree, under the provisions of rules 14 and 15 of Order XXXIV of the Code of Civil Procedure.

Chundra Nath Dey v. *Burroda Shoondury Ghose* (1); *Aubhoyessury Dabee* v. *Gouri Sunkur Pandey* (2) and *Matangini Dassee* v. *Chooneymoney Dassee* (3) followed.

Obiter :—In applying the principle of rateable contribution to mortgage debts the practice of the Courts is to ascertain the valuation of the properties at the date of the instrument creating the security.

Appeal by the Decree-holders.

Application for execution of a decree.

The material facts will appear sufficiently from the judgment.

* Appeal from Order No. 158 of 1914, aginst the order of Babu Behary Lal Chatterjee, Subordinate Judge, 1st Court at Dacca, dated the 21st of February, 1914.

(1) (1895) I. L. R. 22 Calc. 813. (2) (1895) I. L. R. 22 Calc. 859.
(3) (1895) I. L. R. 22 Calc. 903.

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Mr. N. Sircar, Babus Provash Chandra Mitter and *Susil Madhab Mullick* for the Appellants.

Dr. Sarat Chandra Bysack and *Babu Chandra Sekhar Sen* for the Respondent.

C. A. V.

The judgment of the Court was as follows:

January, 19.

This appeal arises out of proceedings taken in execution of a decree dated the 25th April, 1907. The appellants are the decree-holders and the respondent is the judgment-debtor.

It appears that on the 27th April 1899, the respondent mortgaged thirty-seven properties to Krishna Chandra Pal, the predecessor-in-interest of the appellants, as security for a sum of Rs. 22,000. On the same date the respondent executed in favour of the same person another instrument described as a security bond by which the same thirty-seven properties were made security for a sum of Rs. 25,000.

Decrees were obtained on both instruments. The decree now under execution is the decree on the security bond. The decree on the mortgage is dated the 26th June, 1908.

The decree on the security bond has been printed. It is a decree against the respondent personally for the sum of Rs. 55,000 with interest and costs. A declaration is added that the appellants are entitled to a lien over the 37 properties but a decree on the footing of a mortgage is expressly refused. The words are—" Plaintiffs' lien to the properties mentioned in the security bond is declared, but the plaintiff cannot get a decree for the sale of the said properties...as properties mortgaged and ... plaintiffs' prayer to the above effect is rejected." The decree therefore, while it declares the existence of a lien, is a money decree and can only be executed as such. No suit has been brought on the lien. The decree was put in execution in 1908 with the result that a sum of Rs. 11 was realized. Further attempts were made to execute it in 1910 and 1912 but without success.

In execution of the mortgage decree the appellants purchased some of the mortgaged properties, viz. Nos. 16 and 17 in 1909 for Rs. 1,000, No. 15 in 1910 for Rs. 24,000 and Nos. 1—6 in 1912 for Rs. 24,300.

A fresh application for execution of the decree on the security bond was made on the 11th December, 1912. The respondent by a petition dated the 23rd June, 1913, contended *inter alia* that he was entitled to rateable contribution in respect of the debt due under that decree from the nine properties purchased by the appellants in

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execution of the mortgage decree and that execution could only proceed for the balance. The appeal is from the judgment of the learned Subordinate Judge in the Court below, dated the 21st February 1914, giving effect to that contention in the following terms:— "the nine properties purchased by the mortgages should rateably contribute to the debt under the decree obtained on the security bond." By further orders dated the 28th February and 7th March, 1914, he directed that all the thirty-seven properties should be valued by a Commissioner and that the Commissioner should ascertain their present market value, their value at the date of the security bond and their value at the time some of the properties were sold. We may remark incidentally that it was quite unnecessary to direct so many valuations. The practice of the Courts here is to take the valuation at the date of the instrument creating the security. However proceedings were stayed by an order of this Court after the appeal was filed.

At the first hearing the only question argued was whether the respondent was entitled to claim rateable contribution in the execution department or whether such a claim should not be made the subject of a separate suit. When we came however to examine the papers, it appeared to us that there was a more substantial question involved. The mode in which execution is now sought is by the sale of the thirty-seven properties over which a lien was declared by the decree itself and it seemed to us that the course suggested was within the prohibition enacted in rule 14 read with rule 15 of order XXXIV of the Civil Procedure Code. We accordingly had the appeal argued on this point with the result that we are confirmed in the view that the present proceedings are inherently defective and must prove infructuous.

No doubt the objection though it seems to have been mentioned in paragraph 14 of the petition of objection above referred to was not pressed in the Court below and was not urged on the respondents' behalf in this Court until we drew attention to it. Nevertheless the objection is one of positive law apparent on the face of the proceedings, and it cannot be ignored.

The present case is on all fours with the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (1) which was decided under section 99 of the Transfer of Property Act. Section 99 has of course been repealed and rule 14 of order XXXIV which has taken its place is not couched in precisely the same terms. The difference is that while section 99 spoke of "any claim whether arising under

(1) (1895) I. L. R. 22 Calc. 813.

the mortgage or not" rule 14 is limited to claims arising under the mortgage. But the decree now in question is clearly "a decree for the payment of money in satisfaction of a claim arising under" the lien which the decree declares or creates. For the present purpose therefore the two provisions are identical and indistinguishable. The decree-holders cannot sell the properties charged except under a decree under which the chargee has had the opportunity to redeem the charge within a fixed period. The case we have cited is similar to the cases of *Aubhoyessury Dabee* v. *Gouri Sunkur Pandey* (1) and *Matangini Dassee* v. *Chooneymoney Dassee* (2) reported in the same volume and so far as we are aware, the correctness of these decisions has never been questioned.

We may regret that the decree-holders are confronted by this obstacle but it is clear they can obtain no benefit from the present proceedings. That being so the controversy which led to the appeal loses all substance and we need express no opinion in regard to it. The decree-holders cannot bring the charged properties to sale in execution of the decree of the 25th April, 1907. Their only course is to institute a suit on the lien declared by that decree.

The judgment of the 21st February and the order of the 28th February and 7th March 1914 are set aside.

The case will be remitted to the Court below with the direction that the present application for execution be dismissed.

A. N. R. C. *Orders set aside; Application for execution dismissed.*

(1) (1895) I. L. R. 22 Calc. 859. (2) (1895) I. L. R. 22 Calc. 903.

Before Mr. Justice D. Chatterjee and Mr. Justice Chapman.

BHIKARIRAM BHAGAT AND OTHERS

v.

MAHARAJ BAHADUR SING.*

CIVIL. 1915. *May, 7 June, 7.*

Raiyat of a village acquiring homestead land in another—Homestead not held as a part of raiyati holding—Homestead, incidents of.

A raiyat of a certain village acquired a piece of homestead land in another village :

* Appeal from appellate Decree No. 572 of 1913 against the decree of E. Panton Esq., District Judge of Murshidabad, dated the 25th September, 1912, modifying the decree of Babu Debendra Bijoy Basu, Subordinate Judge of Murshidabad dated the 30th June, 1911.

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Held, in the absence of a local custom to the contrary, the incidents of his tenure of the homestead would be governed by the Bengal Tenancy Act and not by the Transfer of Property Act.

Kripanath Chakrabutty v. *Sheikh Anu* (1) and *Harihar Chatterjee* v. *Dinu Bera* (2) followed.

Golam Mowla v. *Abdool Sowar Mondul* (3) and *Protap Chandra Das* v. *Biseswar Pramanick* (4) referred to.

Appeal by the Defendants.

Suit for ejectment.

The material facts and arguments will appear sufficiently from the judgment.

Babus Ram Chandra Majumdar and *Nagendra Nath Bose* for the Appellants.

Babus Dwarka Nath Chuckerbutty and *Sarat Kumar Mitter* for the Respondent.

C. A. V.

June, 7.

The judgment of the Court was as follows:—

The defendants were raiyats holding certain Jamas under the father of the plaintiff at Nalhati. When the Bokhara station on the Nalhati Azimganj Railway (Broad gauge) was opened the father of the plaintiff wanted to establish a Bazar. To do so he wanted shopkeepers to settle on his lands near the station. The defendant Bhikhari was asked to come and open a shop and he did come and was given some lands to build his shop which would necessarily be his dwelling house also. He built a *Kacha* thatched house and held his shop there for a time. Then after a short time he built a *Pucca* room and subsequently other *Pucca* rooms and resided with his family there and held his shop as well. He acquired several raiyati Jamas in this place also under the plaintiff so that he is a raiyat under the plaintiff at Nalhati as well as this place called Sanko or Raipur Telkul. Being a raiyat at Nalhati he acquired the lands for building the shop where he resided and then he became a raiyat at Raipur Telkul or Sanko and resided in the shop building and carried on his agricultural operations from there.

The plaintiff at first sued to evict him as a trespasser but failed, the Court holding that the defendants were tenants and could not be ejected without a proper notice.

This suit was then brought after the service of a notice. The question whether the tenancy is governed by the Transfer of Property Act or by the Bengal Tenancy Act was raised in the previous case but in view of the finding on the question of notice the Court did

(1) (1906) 10 C. W. N. 944.
(2) (1911) 14 C. L. J. 170.
(3) (1893) 13 C. L. J. 255.
(4) (1904) 9 C. W. N. 416.

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not think it necessary to go into the question. In this case the trial Judge held that as the land was originally taken for building a shop it was governed by the Transfer of Property Act and made a decree for ejectment on the payment of Rs. 1,200 as compensation. On appeal by the plaintiff and cross-appeal by the defendants the learned District Judge decreed the entire suit allowing the defendants time to remove the materials of their *Pucca* house.

In second appeal it has been contended that both the Courts below are wrong in not applying the provision of the Bengal Tenancy Act. We think this contention is supported by a number of decisions of this Court dating back from 1893. In the case of [*Golam Mowla* v. *Abdool Sowar Mondul* (1)]. Mr. Justice Rampini held that if a raiyat holding jotes with occupancy rights in a village holds Bastoo land in the same village not as a raiyat but separately from his raiyati holding he would in the absence of a local custom to the contrary have a right of occupancy in the homestead also. It is not clear from the report whether the homestead and the jote were held under the same landlord. Then in the case of *Protap Chandra Das* v. *Biseswar Pramanick* (2) the homestead was under one landlord and the jote under another in the same village. Mr. Justice Geidt held that section 182 of the Bengal Tenancy Act applied. Mr. Justice Ghose did not think it necessary to go into the question. This was in 1904. Then in 1906 came the case of *Kripanath Chakrabutty* v. *Sheikh Anu* (3), in which Rampini and Mookerjee JJ. held that the homestead and the raiyati need not be in the same village or under the same landlord and section 182, Bengal Tenancy Act applied when both were different. The above cases were followed by Mookerjee and Teunon JJ. in the case of *Harihar Chatterjee* v. *Dinu Bera* (4), and it was held that for the application of section 182 of the Bengal Tenancy Act it was not necessary that the homestead and the raiyati should be either in the same village or under the same landlord. Under these rulings the defendants would be holding the homestead lands at Sanko subject to the provisions of the Bengal Tenancy Act from the beginning.

But supposing that during the first 2 or 3 years during which the defendants merely held their shop and resided on the disputed land, and held jotes at Nalhati, they could not invoke the aid of section 182, Bengal Tenancy Act, there can be no manner of objection under a long course of rulings of this Court to thier claim-

(1) (1893) 13 C. L. J. 255.
(2) (1904) 9 C. W. N. 416.
(3) (1906) 10 C. W. N. 944.
(4) (1911) 14 C. L. J. 170.

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ing the protection of that section after they became agriculturists at Sanko and carried on agriculture from their residence at Sanko which was also used as a shop. The incidents of their tenure of the homestead therefore are governed by the Bengal Tenancy Act as no local custom to the contrary is alleged or proved. The suit for ejectment therefore fails. As the parties have not been able to agree as to the rent payable for the homestead, that must form the subject of a separate suit.

The appeal is allowed and the suit of the plaintiff dismissed with costs in all Courts.

A. N. R. C. *Appeal allowed.*

Before Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

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KAILAS CHANDRA SAMADDAR

v.

REBATI MOHAN RAI CHAUDHURI AND OTHERS.*

Appeal—Letters Patent, Cl. (15)—Judgment—Order rejecting application for review—Appeal heard by two Judges of a Division Bench—One Judge ceased to be Judge—Application for review.

An application for review made before one of two Judges of a Division Bench which decided the appeal, the other Judge having ceased to be a Judge of the Court, was rejected:

Held, that the order refusing the application for review was not a judgment within the meaning of section 15 of the Letters Patent and was not appealable.

Mussamut Rughoo Bibee v. *Noor Jehan Begum* (1); *Aubhoy* v. *Shamont* (2); and *Mulji* v *Bangabashi* (3) referred to. *Kamhari* v. *Madan* (4) distinguished.

* In the matter of Letters Patent Appeal against an order of Mr. Justice Teunon rejecting an application for review, dated the 28th November, 1916, against the decision of Teunon and Smither JJ., dated the 4th August, 1916, dismissing the appeal in Appeal from Appellate Decree No. 1363 of 1915, against the decree of P. E. Cammiade Esq., District Judge of Backergunj, dated the 16th March, 1915, affirming that of Babu Kali Prasanno Sen, officiating Subordinate Judge, 1st Court, of Barisal, dated the 17th September, 1913.

(1) (1867) 12 W. R. 459 : 4 B. L. R. A. C. J. 10.

(2) (1889) I. L. R. 16 Calc. 788.

(3) (1905) 1 C. L. J. 26n ; 9 C. W. N. 502.

(4) (1895) I. L. R. 23 Calc. 339.

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Appeal by the Defendant.

Suit for ejectment.

The plaintiffs as purchasers in execution of rent decrees, sued the defendants for *khas* possession of the disputed lands after service of notice under section 167 of the Bengal Tenancy Act. Defendant No 1 alone contested the suit. The suit was decreed in the primary Court. This decree was affirmed by the lower appellate Court. A second appeal by the defendant was dismissed by Teunon and Smither JJ. An application for review being made before Teunon J, Smither J. having ceased to be a Judge, was rejected. Against this order, the present Letters Patent appeal was filed. The question arose whether the appeal should be registered.

Babu Jyotis Chandra Hazra for the Appellant.

The judgment of the Court was delivered by

February, 23.

Woodroffe, J.—Appeal from Appellate Decree No. 1363 of 1915 was dismissed by Mr. Justice Teunon and Mr. Justice Smither on the 4th of August, 1916. An application for review of the judgment passed in the appeal was presented before Mr. Justice Teunon on the 28th of November 1916, when Mr. Justice Smither had ceased to be a Judge of this Court. The application was rejected by Mr. Justice Teunon sitting alone. Against the order rejecting the application for review this appeal is sought to be preferred under section 15 of the Letters Patent. The papers have been put before us for our orders upon the question as to whether the present appeal should be registered It is suggested to us that we might direct the appeal to be registered subject to objection at the hearing. But in the present case no useful end would be served by such a course, seeing that we are prepared to deal with the matter at once.

It has not been contested before us that Mr. Justice Teunon had jurisdiction to pass the order which he did and that Mr. Justice Smither having ceased to be a Judge, Mr. Justice Teunon was in fact the only Judge who could deal with the application which was presented to him. If the application had been made to both the Judges, that is, if Mr. Justice Smither had remained a member of the Court at the time the application was made, the order could not have come before us. There can be no appeal merely because Mr. Justice Teunon who was the only Judge who, under the circumstances, could hear the case, disposed of the application as a single Judge. The intention of the Legislature was that an application for review should be entertained by the Judges or Judge who heard the

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case and no one else. If we were to give effect to the argument before us, the result would be this:—It is admitted by the learned vakil who appeared before us that we should be invited to say that Mr. Justice Teunon erred in not granting the application for review, and that he ought to have granted the application and should have made the Rule absolute. In other words, we should have to consider not merely the judgment of one Judge of this Court, but the judgment of two Judges of this Court, of which review was sought by the application before Mr. Justice Teunon.

It is admitted by the learned vakil who appears before us that there is no authority which directly supports his argument. On the contrary, there are three decisions which are directly adverse to it, namely, *Mussamut Rughoo Bibee* v. *Noor Jehan Begum* (1); *Aubhoy* v. *Shamont* (2) and *Mulji Virji* v. *Bangabashi* (3). The decision in *Ramhari* v. *Madan Mohan* (4) is distinguishable in that, there it was held that the application was not an application for review of judgment. Whether that decision on this point was correct or not we need not here consider: but it has obviously no bearing upon the matter now before us, which is a question whether an appeal does or does not lie from the order of a single Judge refusing an application for what is admittedly a review.

In these circumstances we must direct that the memorandum of appeal be rejected on the ground that no appeal lies to us from the order of Mr. Justice Teunon of the 28th of November, 1916.

A. T. M. *Appeal dismissed.*

(1) (1869) 12 W. R. 459.
(2) (1889) I. L. R. 16 Calc. 788.
(3) (1905) 9 C. W. N. 502.
(4) (1895) I. L. R. 23 Calc. 339.

PRIVY COUNCIL.

PRESENT: *Lord Atkinson, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.*

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May, 11, 12, 15 16, 19, 22. July, 11.

MIRZA SADIK HUSAIN KHAN

v.

NAWAB SAIYED HASHIM ALI KHAN AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

*Mahomedan Law—Oudh Laws Act (XVIII of 1876), Sec. 3—"Gifts" includes gifts in trust—Delivery of possession essential to the validity of the gift—Transfer of Property Act (IV of 1882), Sec. 122—Transfer of subject of gift not valid unless accompanied by delivery of possession—*Purdahnashin *women, applications by—Presumption that officials dealing with such applications do their duty by ascertaining whether the petitioners know the purport and effect of documents signed—Legitimacy—Acknowledgment of paternity by Mahommedan father raises a presumption of legitimacy—Statements as to sonship or heirship by member of family are good evidence of repute under Mahomedan law—Delays in Privy Council appeals animadverted upon—Splitting up of the cross-examination of witnesses condemned—Endorsement on documents admitted in evidence, absence of such endorsement will entail rejection of the document—Code of Civil Procedure (Act V of 1908), Order 13, Rule 4—Trust—Failure of consideration—Election.*

The word "Gifts" in section 3 of The Oudh Laws Act, includes gifts in trust.

According to Mahomedan Law, a holder of property may in his lifetime give away the whole or part of it if he complies with certain forms, but it is incumbent on those who set up such a transaction to prove that those forms have been complied with, and this whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the things given, so far as it is capable of delivery, it will be invalid. If the former, actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself in *præsenti* of the property, and to confer it upon the donee must be proved.

Mehdi Hasan v. *Muhammed Hasan* (1) and *Khujooroonissa* v. *Roushun Jehan* (2) followed.

The transfer of the subject of a gift required by the Transfer of Property Act, section 122, means a valid transfer, and therefore requires, where the gift is by a Mahomedan, delivery of possession as an accompaniment.

The revenue authorities who record mutations of names being required by statute to enquire into the alleged transmission of property, it is scarcely conceivable that when an application for mutation is based upon a statement contained in a petition by a *purdahnashin* lady, these officials would omit to take

(1) (1906) L. R. 33 I. A. 68; 4 C. L. J. 295; I. L. R. 28 All. 439.

(2) (1876) L. R. 3 I. A. 291; I. L. R. 2 Calc. 184.

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adequate steps to ascertain whether she knew the purport and effect of the document she signed. In the absence of all evidence that the official concerned failed in his duty, the maxim *Omnia presumuntur recte esse acta* applies.

If a man acknowledges another to be his son, that *prima facie* means his legitimate son.

Fuzeelun Beebee v. *Omdah Beebee* (1) approved.

Under the Mahomedan law, no statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgement is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible. *Nawab Azmat Ali* v. *Lalli Begum* (2) followed and *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (3) approved.

According to Mahomedan Law, if a member of a family makes statements touching the sonship or heirship of a person those statements are good evidence of the family repute concerning him. *Baker Ali Khan* v. *Anjuman Ara Begum* (4) followed; and *Anjuman Ara Begam* v. *Sadik Ali Khan* (5) approved.

The cross-examination of witnesses should not be broken up into several detached portions. Such a practice exposes witnesses to the risk of being tampered with and provides the fabrication of false evidence.

Delays in the conduct of litigation and particularly of appeals to the Privy Council condemned.

The parties to a trust deed settlement were a Mahomedan of the Shia sect of the first part, his wife of the second, and certain trustees of the third. The deed recited *inter alia* that it was agreed between the parties thereto that the intended settlement should be in full payment and satisfaction of the balance of the dower then payable by the husband, the settlor, to the wife. The settlor in consideration of the premises and in payment and discharge of the balance of the dower payable by him granted, conveyed and assigned to the trustees and their heirs certain properties in certain trusts. The deed was executed by the settlor alone:

Held, that in the absence of any proof, independent of the deed, that the said recited agreement was ever entered into between the settlor and his wife that she would accept the provision purported to be made for her by it in satisfaction and discharge of her claim for the unpaid balance of the dower, the grant and conveyance to the trustees must be taken to be a purely voluntary gift; and that though it was merely voluntary it was open to the wife acting with full knowledge of her rights to deliberately elect to take the benefits conferred upon her by it in lieu of the balance of her dower and bind herself by making her election; but that subsequent election could not be a substitute for the original consideration, and, consequently, notwithstanding the wife's election of which there was no proof the grant to the trustees was still a purely voluntary gift, and the property which it passed was to be ascertained on that footing.

(1) (1868) 10 W. R. 469.
(2) (1881) L. R. 9 I. A. 8 (18); I. L. R. 8 Calc. 422.
(3) (1888) I. L. R. 10 All. 289.
(4) (1903) L. R. 30 I. A. 94 (105); I. L. R. 25 All. 236.
(5) (1899) 2 Oudh Cases 115 (117, 123, 125).

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Held, also, that the Mahomedan law applied to the deed, and the gift made by it being voluntary was void on that ground, that it was not accompanied by a delivery of possession to the trustees of the properties comprised in the deed.

Hashim Ali Khan v. *Sadiq Husain Khan* (1) reversed.

The presiding Judge should endorse as required by the Code of Civil Procedure with his own hand on every document proved or admitted in evidence a statement that it was proved against or admitted by the person against whom it was used. The Board announced in this case that in future on the hearing of Indian appeals they would refuse to read or permit to be used any document not endorsed in the manner required.

Consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh, reversing in part and modifying in part two decrees of the Subordinate Judge of Lucknow.

The facts of the case are set out in sufficient detail in their Lordships' judgment. As therein stated the only question for decision in these appeals were (1) whether a certain trust deed of February 5, 1895, was a valid disposition of the properties which it purported to effect, and (2) whether Sultan Mirza was or was not the legitimate son of Zaigham-ud-Daula. The Subordinate Judge decided the first question in the negative and the second in the affirmative. The Judicial Commissioners' Court reversed both decisions : For a report of the case see *Hashim Ali* v. *Sadiq Husain* (1).

Sir J. Simon, K. C., *Sir W. Garth* and *Majid* for the Appellant : Two mortgages of the portion of the late Nawab Zaigham-ud-Daula's property were executed in favour of appellant, one by the 2nd respondent, his widow, for herself and as guardian of the first and second respondents, her minor sons by him, and the second by Sultan Hasan Mirza, claiming to be his son. The first of these two suits was brought by appellant to enforce his rights under the first mortgage. He was met by the plea that part of the property mortgaged was the subject of a trust created by a deed of February 5, 1895, and that the mortgage was invalid so far as such trust property was concerned. The second suit was a declaratory action to set aside the second mortgage on the ground that the mortgagor was not a legitimate son of the deceased Nawab and so had no interest which he could mortgage.

The law to be administered by the Court of Oudh is laid down by section 3 of the Oudh Laws Act. By clause (b) of that section the rule of decision in questions regarding "Gifts" is to be "the Mohammedan Law in cases when the parties are Mohammedans." We contend that by virtue of this provision, the validity of the

(1) (1911) 14 Oudh cases 356.

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trust deed must be determined by Shiah Mohammedan Law, the parties belonging to the Shiah sect. The Court of appeal have taken the view that "Gifts" in section 2 means "Hiba" pure and simple : that a gift for consideration *Hiba-bil-ewaz* does not come under the section, neither does a trust, and that for both reasons Mohammedan Law does not apply. This view puts too narrow a sense on the word "Gifts." The deed, we say, is a deed of gift, the mere interposition of a trustee makes no difference, and the Mohammedan law applies.

[Lord Parker : The section does not exclude exchange for consideration].

In Mohammedan law exchange is dealt with under another head altogether.

The document falls within the generic word "Gift."

Assuming that Mohammedan law applies, there are several fatal objections to the validity of the deed.

In the first place, mutation of names was never effected and this shows that possession was not delivered. This is fatal in the case of simple gift and in the case of gift for consideration material evidence of the unreality of the transaction, which we contend was a mere device to protect the Nawab against his creditors.

By Shiah Mohammedan law a gift pure and simple is invalid unless accompanied by delivery of the thing given. Such delivery is not required when the gift is for consideration, but in that case actual payment of the consideration must be proved, and also the *bona fide* intention of the donor to divest himself of the property *in præsenti* : *Mehdi Hasan* v. *Muhammad Hasan* (1) ; *Khujooroonissa* v. *Roushun Jehan* (2). Here neither delivery of possession nor payment of consideration is proved.

Further, the document is bad under Mahomedan law because (1) it reserves for the grantor a contingent interest, (2) the interest reserved for the sons does not vest at once—the class to take is to be determined at the settlor's death, and, (3) it is a provision in lieu of dower, and there is no proof that it was accepted by the wife.

Alternatively, we submit that there is nothing to show that the Nawab intended the document to be operative as a gift or to divest himself of the property.

The second suit should have been dismissed on the ground that it asks for a declaration only, and that section 42 of the Specific Relief Act, does not allow such a suit when the plaintiff is entitled

(1) (1906) L. R. 33 I. A. 68 (75) ; 4 C. L. J. 295 ; I. L. R. 28 All. 439.
(2) (1876) L. R. 3 I. A. 291 ; I. L. R. 2 Calc. 184.

to consequential relief. Here the plaintiffs could have asked for possession. The general prayer for further relief does not include possession : the relief asked for must be specfic under section 42.

[Sir John Edge : Yes, that is generally understood in India. The prayer for relief must be specific ; if the plaintiff wants possession he must ask for it.]

He must also pay the court-fee due on a suit for possession. Here he only paid Rs. 10 the fee for a declaratory suit and never offered to pay more.

We took this point in the first Court and it was decided in our favour.

[Lord Atkinson : The point has not been dealt with by the appellate Court. It is unsatisfactory to ask this Board to deal with it now.]

As to Sultan Mirza's legitimacy, the burden of proving that he is not a legitimate son of the Nawab is on the plaintiffs, who assert it : Indian Evidence Act, sections 101, 102. If however, the *onus* is on the appellant, he has discharged it ; the evidence shows his legitimacy. The plaintiffs' case in the first Court was that Sultan Mirza was not the Nawab's son at all, but the son of a servant : this was disbelieved by the Subordinate Judge and was not even discussed by the appellate Court. The admissions by the third respondent and the acknowledgment by the Nawab, coupled with the other evidence, are conclusive that Sultan Mirza was the Nawab's legititimate son.

[Mr. Ameer Ali : There is presumption that the connection was on a legitimate basis. It is unlikely that Zaigham would commit what is not merely a sin but a crime under Mohammedan Law, when by the law of the Shiah, he could validate his acts by going through a simple form.]

De Gruyther K.C., and *Dube* for the Respondents : The point raised under section 42 of the Specific Relief Act has no substance. We instituted the suit originally against appellant only, and could not ask for possession as appellant was not in possession. Sultan Mirza who is in possession was added at the instance of the Court, and has subsequently withdrawn.

No authority has been cited invalidating the deed of settlement in Shiah law. It does not offend against the rule forbidding contingent gifts. Amongst Shiahs the creation of a life interest is allowed ; the interest which remains is a definite one like what we would call a vested remainder, and though liable to be displaced is not merely a contingent right. The mere fact that the settlor

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retains a right to the recurring produce during his lifetime does not render a gift incomplete: *Nawab Umjad Alli Khan* v. *Mussumat Mohumdee Begum* (1); *Banoo Begum* v. *Mir Abed Ali* (2); *Umes Chunder Sircar* v. *Mussumat Zahoor Fatima* (3).

If a gift is made subject to a condition inconsistent with full ownership on the part of the donee, the gift is valid, but the condition void: Wilson's Mohammedan Law, Edition 1908, pages 332, 334; Edition 1912, page 350, para. 313.

The cases cited show that Shiahs can create an estate for life with a contingent interest to some one else, and this is constantly done under the law of the wakf. The intention that only children living at the time of the settlor's death should take is not contrary to Mohammedan law. "Resulting Trust" is a creation of English Law; the settlor has no intention of creating a resulting trust in his own favour. The rule that a gift cannot be made to take effect at an indefinite time merely follows the principle that to be good a gift must be accompanied by possession. All that the Shiah law requires is that the subsequent donees should be in being when the intermediate estates come to an end; Ameer Ali's Mohammedan Law, edition 1912, Vol. 1, page 142. There is nothing in the two cases relied on by the other side to shew that a gift with a reservation by the donor of a life interest is bad, and in fact it is the most common form of wakf. There is therefore nothing in the terms of the deed which invalidates it under Mohammedan law.

Delivery of possession is not essential in the case of trusts, but merely of simple gifts. Before 1882 it was not necessary by Mohammedan Law to have writing to effect a transfer of immovable property. In that year the Indian Trusts Act (Act II) and the Transfer of Property Act were passed. Owing to section 129 the latter Statute affects gifts by Mohammedans which amount to sale or exchange, but not gifts pure and simple: hence the Mohammedan law requiring delivery of possession in the case of these latter remain in force. The Indian Trusts Act however provides that trusts of immovable property can be created only under that Act i.e., by a registered instrument; hence no Mohammedan can since that Act create such a trust by grant, gift and delivery of possession, but only by a registered instrument, and it is submitted that such registered instrument is sufficient *per se* and that no further delivery of possession is required.

(1) (1867) 11 M. I. A. 517 (543, 547). (2) (1907) I. L. R. 32 Bom. 172 (178).
(3) (1890) L. R. 17 I. A. 201 (209); I. L. R. 18 Calc. 164.

[Lord Parker: Surely the question remains, what is valid transfer. And to comply with Mohammedan law you must have delivery of possession.]

[Lord Atkinson: You must get the property into the trustee before he can hold it for the beneficiary.]

It has been held by the Bombay High Court that delivery of possession is requisite to complete the title of the trustee: *Moosabhai Mahomed Sajan* v. *Yacoobhai Mahomed Sajan* (1). But the contrary view was taken by the Madras High Court in *Ranganadha Mudaliar* v. *Bagirathi Ammel* (2), where it was held that registration was sufficient.

That evidence does not establish Sultan Mirza's legitimacy. A mere casual statement as to paternity is not an acknowledgment of legitimacy; to have that effect it must be something like a declaration: *Abdool Razack* v. *Aga Mahomed Jaffer Bindaneem* (3) and *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (4).

The third respondent on whose admissions in sundry petitions reliance is placed, is a *purdanashin* lady, and there is no independent evidence that she knew or understood the contents of those documents.

Sir J. Simon K. C., replied.

Their Lordships' judgment was delivered by

Lord Atkinson:—These are consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh, Lucknow, both dated the 13th November, 1911, which reversed in part and modified in part two decrees, each dated the 25th October, 1909, of the Court of the Subordinate Judge of Lucknow. *July, 11.*

The first of the two suits in which those last-mentioned decrees were made, namely, that numbered 76 of 1907, the appeal in which is No. 121 of 1913, was instituted by Mirza Sadik Husain Khan, the appellant in both the present appeals, to enforce a mortgage, dated the 26th June, 1900, executed in his favour by the third respondent in the first appeal, namely, Nawab Ummat-ul Fatima, in her own right, and also as guardian of her two sons, then minors, the first and second respondents in the first appeal, to secure the repayment of 20,000 rupees admittedly advanced by the mortgagee to this lady, with interest at 1 per cent. per mensem.

(1) (1904) I. L. R. 29 Bom. 267 (274).
(2) (1906) I. L. R. 29 Mad. 412.
(3) (1893) L. R. 21 I. A. 56; I. L. R. 21 Calc. 666.
(4) (1888) I. L. R. 10 All. 289.

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The second of these suits, namely, that numbered 51 of 1908, the appeal in which is numbered 134 of 1913, was instituted by the respondents Nawab Saiyed Hashim Ali Khan and Nawab Kasim Ali Khan, the latter by his guardian against this same mortgagee and one Sultan Mirza, claiming to be the step-brother of the plaintiffs, for a declaration that a second mortgage made by the said Sultan Mirza of his share in all the family property in this mortgagee's favour, to secure the repayment of a sum of 8,000 rupees, with interest, was a nullity, on the ground that the said Sultan Mirza was not entitled to any share in the family property, first by reason of the provisions of a certain indenture, dated the 5th February, 1895 hereafter dealt with, and secondly because he was not the legitimate son of his alleged father, the grantor in the said deed. This declaration is the only specific relief prayed for, but there is a prayer for general relief.

The litigation relates to the estate of Nawab Zaigham-ud-Daula, who was the son of the Prime Minister of the last King of Oudh, and a Mahomedan of the Shia sect. He was admittedly regularly married twice. By his first wife, Badshah Begum, he had two sons and one daughter, who pre-deceased him, and one daughter, Raushan Ara Begum, who survived him. By his second wife, the third respondent in the first appeal, married after the death of the first wife, he had two sons, the first and second respondents in that appeal. He died on the 1st August, 1898.

Both these suits were tried by the same Subordinate Judge, who delivered separate judgments. The Court of the Judicial Commissioner dealt with both the appeals in one judgment.

The appellants and the respondents in both appeals agree in stating that the principal questions for decision are (1) whether this trust indenture of the 5th February, 1895, duly executed by the deceased Nawab and registered, was a valid disposition of the properties therein comprised, and, if so, whether the above-mentioned mortgages, so far as they purport to charge these properties, and the alleged share of Sultan Mirza in the family property respectively are invalid; and (2) whether Sultan Mirza was shown to be the legitimate son of Zaigham-ud-Daula, the grantor in the trust deed. It was not, as their Lordships understood, disputed that the sum of 20,000 rupees, purported to be secured by the first mortgage, was, in fact, advanced to the Nawab's widow; nor that it was borrowed for the purpose of being applied in payment of certain of the settlor's debts, in order to save some of the properties comprised in the trust deed from being sold at the

suit of some unsatisfied creditors, nor that it was, in fact, so applied. No question was raised as to whether the first mortgage did not, under the circumstances, capture whatever interest the three respondents might have had in the entire immovable property of Zaigham-ud-Daula, however derived. Their Lordships therefore base their decision solely on the points raised by the parties and dealt with by the Courts below.

It was contended in the second suit by Mirza Sadik Husain Khan, the mortgagee, that between the dates of the marriages of the Nawab with the two above-mentioned ladies he contracted a marriage in the *muta* form with an Abyssinian slave girl, named Zohra Kainam, who had been brought home by his father on the occasion of his making a pilgrimage to Mecca and subsequently given by the father to him, and that Sultan Mirza was the offspring of that union. The fact that such a marriage ever took place was denied by the plaintiffs in that suit, and a vast body of evidence, oral and documentary, was adduced by both sides on the issue of Sultan Mirza's legitimacy.

Now, as to the trust deed of the 5th February, 1895, it is necessary, in order to determine the issue raised in reference to it, to consider first, its provisions; second, the circumstances under which, and the purpose for which it was apparently executed; and thirdly, the mode in which the property purporting to be conveyed by it was subsequently treated and dealt with by those having rights over or interest in it.

The parties to the deed are the Nawab Zaigham-ud-Daula, of the first part; Fatima, described as his second wife, of the second part; and Nawab Mahomed Medi Ali Khan and the aforesaid Fatima, described as trustees, of the third part. After reciting that the Nawab Zaigham-ud-Daula was seized and possessed for an estate of inheritance in possession of certain undivided shares in certain zemindari villages, and other landed properties in Lucknow, and in the districts of Lucknow, Fyzabad, and Sitapur, and also of a house in Calcutta numbered 13, Russell Street; that on the treaty of the marriage with his said wife, Fatima, he had agreed to give her a dower of one lac of rupees, and also to settle upon her a monthly allowance of 100 rupees; that in part performance of that agreement, and in satisfaction of this monthly allowance, he had by a registered instrument, dated the 14th October, 1887, transferred to her a certain house, described as yielding a monthly rent of 100 rupees which she had since enjoyed; and had, in addition, already paid to her 1,5000 rupees in part payment of her dower, leaving the sum of

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85,000 rupees, the balance thereof, unpaid; that he had, by gifts of jewellery and effects of the value of one lac and 50,000 rupees, and otherwise, provided for his children by his first wife; that with a view to prevent further disputes, quarrels, and litigation between his said wife, Fatima, and her children, and the children of his first marriage, he was desirous of making the settlement thereafter appearing, it was agreed between the parties thereto that the said intended settlement should be in full payment and satisfaction of the dower payable by him, as therein mentioned. He, in consideration of the premises, and in payment and discharge of the balance of the dower payable by him, granted, conveyed, and assigned to the trustees and their heirs all the lands, tenements, and hereditaments in the schedule to the deed mentioned to hold the same, subject to a certain mortgage therein specified, to the payment of certain small annuities to the persons therein named, and to the cost of maintaining and managing the said properties, and collecting the rents thereof, in trust to pay the income of the same to his said wife, Fatima Begum, during her life, for her sole and separate use, subject to the cost of maintaining and educating his children by her, and after her death in trust for all the aforesaid children living at his, the settlor's, death, as tenants-in-common, in equal shares. A power of leasing for a term of six years was given to the trustees, and a provision introduced that in case one of the trustees should die, or be unable or unwilling to act, the Official Trustees of Bengal should be appointed trustees in such trustees' stead. The deed contains, in addition, the usual covenants by the settlor for good title and quiet enjoyment. This deed is in the English language. It does not contain any formal release of Fatima Begum's right to payment of the unpaid balance of her dower. It is executed by the settlor alone. Mr. George Charles Farr, his solicitor, and Priya Lal Mullick, described as a solicitor, but in fact the clerk of Mr. Farr (to whom the mortgage mentioned in it was made), are the witnesses to it. The lady was not examined as a witness. No proof whatever, independent of the deed, was given that any agreement such as is mentioned in it was ever entered into between the settlor and his wife, Fatima Begum, to the effect that she would accept the provision purported to be made for her by it in satisfaction and discharge of her claim for the unpaid balance of her dower. That agreement, however, is the only valuable consideration moving to the settlor given for the grant he makes. Unless and until this agreement is proved to have been entered into, the grant and conveyance to the trustees must be taken to be a purely voluntary gift. Though it should be merely

voluntary, Fatima Begum might, no doubt, acting with full knowledge of her rights, deliberately elect to take the benefits conferred upon her by it in lieu of the balance of her dower. If she did so elect, she would be bound by the choice thus made. But that election could not create the agreement between her and her husband, which is the sole consideration for the deed, nor could it enlarge the operation of the deed itself. Notwithstanding it, the grant to the trustees would still remain a purely voluntary gift, and the property which it passed would have to be ascertained on that footing. Subsequent election could not be held to be a substitute for the original consideration.

The interests granted to the children are contingent on their surviving their father. By the happening of that event, the class to take is to be ascertained. Children born after the date of the deed, but alive at the death of the settlor would be members of that class. In addition, the deed fails to provide expressly or impliedly for the payment of the income of the property held in trust on each of three different contingencies. First, the contingency of Fatima Begum dying childless in her husband's lifetime. Second, of her predeceasing him leaving children, none of whom survived him ; and, third, of her predeceasing him leaving children some of whom survived him. In each of these cases a resulting trust in the settlor's favour would arise on the death of his wife. In the first case of the absolute beneficial interest in the trust property, in the second of the income of that property while any of his children lived, and of the absolute beneficial interest in it on the death of the survivor of them, and in the third case of the income of the trust property in the interval between the death of his wife and his own decease. So that the settlor has not by the provisions of this deed divested himself absolutely, but only in certain contingencies of all interest in the property granted and conveyed by it. It was contended by Sir John Simon, on behalf of the appellants, that by reason of the conditional nature of this gift to the trustees, the contingent nature of the provision for the children, and these contingent resulting trusts in the settlor's favour, these dispositions made by the deed were void under the Mahommedan law observed by the Shia sect.

These are no doubt very important points. Owing, however, to the conclusions at which their Lordships have arrived on the other points raised in the case, they do not find it necessary to express any opinion on these points and, therefore, abstain from doing so. By the third section of the Oudh Laws Act (XVIII of 1876) it is enacted that between Mahomedans the Mahomedan law

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is to be applied to the many important matters therein enumerated, including amongst others, "wills, legacies, and gifts." The Court of the Judicial Commissioner has held that the term "gifts" as here used does not include gifts in trust. Their Lordships cannot adopt such a narrow construction of the term "Gifts" as would exclude any gift where the donor's bounty passes to his intended beneficiary through the medium of a trust, so that while a gift by A. to C. direct would be governed by the Mahomedan law, a gift by A. to B. in trust for C. would be governed by some other law. So to hold would, they think, defeat the plain purpose and object of this section of the statute. The Mahomedan law in their view, therefore, applies to this deed ; and the gift made by it, being voluntary, will under that law be void, unless it be accompanied by a delivery of such possession as the subject of the gift is susceptible of.

In *Chaudri Mehdi Hasan* v. *Muhammed Hasan* (1) it is at p. 76 of the report, laid down by this Board that, according to Mahomedan law, a holder of property may in his lifetime give away the whole or part of it if he complies with certain forms, but that it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and this will be so whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the thing given, so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in presenti* of the property, and to confer it upon the donee must also be proved. The case of *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan* (2) supports this statement of the law.

As six out of the ten hereditaments granted by the deed consist of undivided shares in certain zemindari villages and parcels of land, physical possession is, in their case, impossible, and as to them, the receipt of the appropriate portion of the rent or income issuing out of or derived from them is the only form the necessary possession could assume. The validity of the grant of these items of property would depend, therefore, upon whether the trustees of the deed, to the exclusion of all other persons, entered into the receipt or enjoyment of these rents or income. Mr. de Gruyther contended, however, as their Lordships understood him, that the rule of law laid down by those authorities was altered or qualified by the combined operation of "The Transfer of Property Act" (Act

(1) (1906) L. R. 33 I. A. 68 ; 4 C. L. J. 295.
(2) (1876) L. R. 3 I. A. 291 ; I. L. R. 2 Calc. 184.

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IV of 1882) and "The Indian Trusts Act" (Act II of 1882). He insists that if the deed of gift of immovable property be duly registered, delivery of possession is not necessary to make the gift valid, or, if necessary, may be effected at any time during the donor's life, provided he be then capable of giving the property. By section 122 of the first of these statutes a gift is defined to be a transfer of existing movable or immovable property voluntarily without consideration by one person, calling himself a donor, to another, called a donee, and accepted by or on behalf of the donee. The acceptance must be made during the lifetime of the donor, and while he is still capable of giving. If he should die before acceptance, the gift is void. If the subject of the gift be immovable property, then, by section 123, the transfer must be effected by a registered instrument, signed by or on behalf of the donor, and attested by at least two witnesses. By section 125 it is provided that a gift of a thing to two or more donees, of whom one does not accept, is void as to the interest he would have taken had he accepted.

Sec. 55 enacts that, subject to the trust, the beneficiary has a right to the rents and profits of the trust property, and section 56 that where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries competent to contract and all are of one mind, he or they may require the trustee to transfer the property to him or them, or to such person as he or they may direct.

Both these statutes, however, were passed long before the year in which the first of the above-cited authorities was decided. The 122nd section of "The Transfer of Property Act" still requires a "transfer" to be made of the subject of the gift. This would *prima facie* mean a valid transfer, and would therefore require the transfer to be accompanied by delivery of possession. But it is argued that there can be no delivery without acceptance by the donee of the gift. It implies acceptance, and as acceptance may take place at any time during the donor's life, under the conditions mentioned, it follows that the required delivery of possession may take place at any time during his life under the same conditions. Their Lordships think that this line of argument is unsound, but even if it were sound it is not pretended that during the life of the donor in the present case anything was done by him which would amount to delivery of possession of the properties comprised in the mortgage deed, or anything done by the trustees or by Fatima Begum alone, which would amount to proof of an acceptance of the gift, or of an election to take, under the deed of the 5th February, 1895, save

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what happened in a friendly suit instituted by the deceased Nawab against the trustees on the 10th September, 1895, to obtain permission to sell the Kothi, 13, Russell Street, Calcutta. This matter will be dealt with in its chronological order.

As to the circumstances under which this trust deed was executed it was contended on behalf of the appellant that the settlor was heavily indebted at its date, and that by it he purported to divest himself of almost all the property then belonging to him, that it was merely designed to protect him against the claims of his pressing creditors, and was never intended by him to be an operative instrument. It is clear from the entries in the day book of Mr. Farr, his solicitor, that Zaigham-ud-Daula did not, at first, intend to make any disposition in trust of the property comprised in the deed, and it is equally clear that he never intended that the deed should contain any clause releasing his wife's claim for the unpaid balance of her dower. A clause to that effect was introduced by counsel into the draft sent to him to settle. It was a natural and proper provision, if the agreement mentioned in the deed between the settlor and his wife had ever in fact been entered into; but notwithstanding that the settlor was advised by his solicitor to allow this clause to be embodied in the deed, he absolutely declined to do so, and it was accordingly omitted from it. Again, while he lived no mutation of names took place as to his shares in the zemindari villages or lands to which mutation was applicable.

To some of the properties comprised in the deed mutation, no doubt, did not apply. But if this was a genuine transaction, and the deed was intended to be an operative instrument, there was no reason why the names of the trustees should not have been substituted for that of the settlor on the registry in reference to these villages, and many reasons why they should have been so substituted. It would have completed the transaction, and tended to remove all doubt about its nature. That, however, was not all. The income of the trust property was never, during the lifetime of the settlor, paid to the trustees or to the wife. Mehdi Ali Khan, the father of Fatima Begum, one of the trustees, was also mukhtar of Zaigham-ud-Daula, and at pages 370-71 of the second record he states that the Hakim Safdar Husain, the Thekadar, made the collections; that this man sent the income of these villages to him; and that he, as such mukhtar, brought the money to Zaigham-ud-Daula during the latter's life. This was a direct breach of trust if the deed was an operative instrument.

These facts are, no doubt, calculated to throw grave suspicion

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on the genuineness of the transaction of February 1895, but they do not appear to their Lordships to be sufficiently convincing to induce them to rest their judgment upon them rather than upon other points where, in their view, there is less room for doubt.

The written statement filed by the trustees in the friendly suit above mentioned was most relied upon. It is dated the 16th December, 1895. In that suit Mr. Farr was solicitor for Zaigham-ud-Daula. His partner was solicitor for the trustees. Medhi Ali Khan gave the instructions to this gentleman. There is no proof whatever that he ever communicated with Fatima Begum on the subject.

The plaint is a lengthy document. It sets out, amongst other things, the deed of the 5th February, 1895. The written statement of the trustees begins by admitting all the statements contained in the plaint, and then states that the defendants are trustees appointed under the deed of the 5th February, 1895, and as such hold the several tenements and hereditaments described in the schedule annexed to it upon the trusts created by it. That is all as to the contents or provisions of the deed. In fact, the Nawab himself was then receiving the rents of those hereditaments and continued to do so for two years afterwards; and in the plaint it is stated the Nawab himself had entered into a conditional contract for the sale of the Russel Street premises for 125,000 rupees. This written statement purports to be signed twice by each of the trustees, and signed once by their attorney, Priya Lal Mullick. Over one set of the signatures of the trustees it contains the usual declaration by the defendants that the statements contained in the document are true to their knowledge, except as to matters stated on information and belief, and as to such matters they believe them to be true. And following this is the endorsement—"Explained by me to the defendants above named, Priya Lal Mullick, articled clerk to Mr. G. C. Farr, solicitor, Calcutta." That is the Nawab's solicitor. This witness was not produced, and no explanation was given for his absence. And though Medhi Ali Khan (p. 257) identifies his daughter's signature to this written statement, exhibit No. 5, he says nothing about the document being read and explained either to himself or to her.

In their Lordship's view it is impossible under these circumstances to accept this written statement as satisfactory proof that the contents, purport, or effect, of this trust deed were ever brought to the knowledge of Fatima Begum; that she had ever as a trustee accepted the gift purporting to be contained in it, or ever on her

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own behalf accepted the provision purporting to be made by it for her and her children in satisfaction of her claim for the balance of her dower. Her subsequent conduct and action up to and including the execution of the mortgage sued upon is, they think, entirely inconsistent with any such intention on her part.

These latter are most significant. On the 7th September, 1898, less than six weeks after her husband's death, proceedings, to which she was a party, were instituted to obtain mutation of names in reference to his undivided share in seven zemindari villages. She was presumably made aware of the nature and object of these proceedings and the purport and effect of the documents that bear her name. If she was then aware of the existence and provisions of the trust deed, these proceedings amount, first, to a most emphatic repudiation of it; second, to a most emphatic assertion of Sultan Mirza's legitimacy; and thirdly, a determined effort, against her own pecuniary interest, and that of her children, to confer upon him certain proprietary rights.

Separate applications were made, one for each village. That dealing with the ands of Mahtab Bhagh (p. 237 (1)) may be taken as typical of them all. It purports to be made under the provisions of section 61 of Act XVII of 1876 (The Oudh Land Revenue Act). Having regard to the contention of the respondents that no weight or significance is to be attached to the statements contained in documents such as those signed by her in these proceedings, unless and until it be proved affirmatively that their contents were fully understood by her, it is essential to examine some of the provisions of this statute. By section 61, it imposes on all persons obtaining possession of land or the profits thereof, whether by succession, purchase, or other form of transfer, a statutory duty to give notice of the same, immediately after it has taken place, to the tahsildar of the tahsil in which the mahal to which the land belongs is situated, or the Deputy Commissioner of the district. If the notice be given to the form r that officer is bound to report to the Deputy Commissioner. By section 62 the Deputy Commissioner, on receiving this notice, is bound to make such enquiry as the Chief Commissioner may from time to time prescribe, in order to ascertain the fact of the alleged transmission of the property, and if the transfer appears to have taken place he must, in accordance with the rules made by the Chief Commissioner, record the same. This entry, no doubt, does not prejudice the right of any person who may claim and establish in a Court of competent jurisdiction a right to an interest in the land to which the entry refers. Section 63 enacts

that if the person succeeding be a minor or under disability, the guardian or other person who shall have charge of the property, shall give the notice, and by section 64 a fine is imposed on any person neglecting for three months to give the notice prescribed by section 61.

These are the administrative duties of a quasi-judicial character imposed upon these public officials. It is scarcely conceivable that when the application is grounded upon the statement contained in a petition signed by a purdanashin lady, both on behalf of herself and as guardian of her children, these officials would omit to take adequate steps to ascertain whether she knew the purport and effect of the document she signed. He would utterly fail in his duty if he omitted to do so, and in the absence of all evidence that he did fail in his duty in this respect the maxim *omnia presumuntur recte esse acta* must, their Lordships think, be applied to the proceedings.

Now in the body of the petition it is stated that Zaigham-ud-Daula died on the 1st August, 1898, that the five persons named, beginning with Sultan Mirza, described as his son, were his heirs. The undivided shares of the deceased in the several villages to which these heirs became entitled are stated, namely, two shares to each of the sons, one share to Raushan Ara Begum, the surviving daughter of the first marriage, a married lady who died in the year 1904 but whose husband is still alive, and one-eighth share of the entire property to Fatima Begum. It is further stated that on the 1st August, 1898, these five persons got possession of their respective shares jointly by inheritance. As that was the date of the death of the ancestor, physical possession of an undivided share being impossible, and no rent having been received by the heirs, this can only mean that they got a right to possession by virtue of the interest in his undivided share which they took by inheritance. These five heirs of the deceased Nawab then pray that after due enquiry his name might be expunged, and the names of the applicants, according to their legal shares, may be entered on the register of the Zamindari Chakdari in his stead. The petition purports to be signed by Sultan Mirza, Fatima Begum and Raushan Ara Begum, and is endorsed thus: "Lochan Lal, pleader." Upon this application an order bearing date the 30th September, 1898, was made purporting to be signed by the Pargana officer to this effect: "In accordance with the reports of the Tahsildar the mutation of names is sanctioned. Let this be returned for compliance."

In addition to this, in the application relating to the village of

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Ghaila, Pargana Lucknow, a consolidated statement is made by the same pleader, bearing date the 28th September, 1898, setting forth the shares of the same several heirs to the Nawab's interest in seven villages, and at p. 81 of the Record the Tahsildar's report, dated the 28th September, is to be found. He reports that Nawab Zaigham-ud-Daula was a share-holder in the therein mentioned villages, which were *muafidar* (revenue-free grants); that he died on the 1st August, 1898; that his heirs, whose names were given, were in possession in place of the deceased; that Proclamation was duly issued, but the time had expired and no objection had been filed. It was therefore submitted that mutation in favour of the heirs in place of the deceased be sanctioned. The names and descriptions and shares of the five heirs are set forth, the males being described as sons of the deceased. A statement in detail of the shares in the villages is then given, and the report winds up with the following passage :—

"In the reports of the other cases a reference was made to this case. In all these cases orders for mutation were passed with reference to this case; all the cases are of the same nature."

On the same day a statement is made and signed by Chandu Prasad Patwari, setting out the same succession to the shares of the deceased in this village, to the effect following :—

"The above-named five persons (naming them) are the heirs and owners according to their legal shares, and are entitled to mutations of names. Heard and admitted." And on the 7th October, 1898, an order is made and signed by the officer in charge of the Tahsil to the effect that, the case being proceeded with that day and the Tahsildar's report being perused, it was ordered, in accordance with the Tahsildar's report, that the mutation slips be issued in the names of the deceased; that the fees be realised; that formal orders be issued; and that, after compliance, the files be consigned to the record room. There is nothing to show that the requirements of the Revenue Act of 1876 were not strictly complied with. In the absence of such evidence it must be assumed that they were complied with. These proceedings accordingly amount to something far more important and convincing than a mere admission by Fatima Begum of Sultan Mirza's legitimacy. They amount to the doing of an act by her by which an additional sharer in the property of the deceased is brought in and is given the right to receive portion of the income of that property, which property, if the deed were valid, belonged mainly to her and her children, and if invalid,

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belonged to them to a lesser extent. Further, the act was accompanied by a statement explaining it and setting forth the grounds on which it was based, namely, the heirship, as a legitimate son, of Sultan Mirza. It would appear to their Lordships that the more probable inference to be drawn from this treatment of Sultan Mirza is that it is but a continuance of the recognition and treatment he received during the lifetime of the deceased Nawab, rather than an entire departure from the course previously pursued.

It would be strange indeed if the ill-begotten child of a menial servant and a frail negress, never therefore owned as a son of the Nawab, or treated by him as such, should be at once selected for such an honour. Moreover, it was not a barren honour, for if Sultan Mirza speaks the truth (at p. 276 of the second record), from the time of the mutation he and the other heirs "have been realising their shares of the profits separately." He does not appear to have been contradicted or even cross-examined on this point, and the husband of Raushan Ara Begum, who is still alive, was not produced to prove that his wife, though excluded from all further participation in her father's assets by the trust deed, did not also receive her share of the income of these zemindari villages.

On the 9th June, 1899, Fatima Begum applied under section 10 of Act VIII of 1890 to the District Judge of Lucknow to be appointed guardian of the persons and property of her two minor sons. The application purports to be signed by her in both her capacities and by the same pleader, Lochan Lal. It contains a final passage in the usual form to the effect that she knew of her own knowledge that the entire immovable property to which the minors are entitled was of the value of 93,300 rupees, of which 60,000 rupees represent the Kothi, 13, Russell Street, Calcutta, and 15,000 rupees the property situate in the city of Lucknow, leaving a balance of 18,300 rupees as the value of the other property; that they were in possession of this property; and that their relatives are, amongst others, Hasan Mirza, brother of the minors, born of a Harem of Zaigham-ud-Daula, deceased.

In the schedule to the application, also purporting to be signed by her, she sets out the shares of each of the properties contained in the trust deed belonging to the minors. For instance, their share of the Kothi, 13, Russell Street, Calcutta, is put down at twelve twenty sevenths estimated value 60,000 rupees; whereas, under the trust deed, if valid, they would be entitled to the entire interest in this property, subject to their mother's life estate. Every item in this schedule is inconsistent with the provisions of the trust deed.

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On the 12th June, 1900, Fatima Begum made an application under section 31 of Act VIII of 1890, to the District Judge of Lucknow, for permission to mortgage the shares of the minors, together with her own share in the properties therein mentioned for the sum of 35,000 rupees, for the purpose of raising money to be applied in discharge of the judgment debts of the deceased Nawab. Two statements, A. and B., were attached to this application, the first setting out the debts of the deceased Nawab, and the second, the properties of which he died seized or possessed. In the former the name of Fatima Begum appears as an encumbrancer on all the property of the deceased Nawab for the sum of 85,000 rupees, the unpaid balance of her dower. In the second, the first number is the Machhli-wali-Baradari and seventy-eight shops and land situated in Chauk, City of Lucknow, the ancestor's share being four-ninths and the minor's two-ninths. The annual income is stated to be 1,500 rupees. The income arising out of the four-ninths share, 125 rupees per month and the charges upon it created by the ancestor are put down at rupees 31,755-7-8, and its estimated value at 25,000 rupees, so that there is no beneficial interest whatever in it.

No. 15 is Machrehta, in the district of Sitapur, and No. 16 the village of Janaura, in the district of Fyzabad, in each of which the share of the deceased was four-ninths, both are stated to be included in a lease, and the estimated value of each is only 600 rupees.

No. 17 is Kothi, 13, Russell Street, Calcutta, the ancestor's share in which is stated to be 16 annas, the minor's half, the annual income 7,800 rupees, and the estimated value 55,000 rupees. The amount due upon this under Mr. Farr's mortgage is stated to be rupees 20,023-2-3, and his costs rupees 5,117-13-2. The shares of the minors are set forth, they are half their father's share. If the trust deed was valid their share would be the entire of their father's share.

On the 26th June, 1900, the District Judge granted permission to mortgage Nos. 2 to 14 on list B. for 16,000 rupees, as per terms of the draft mortgage filed. The shops in Lucknow, and No. 13, Russell Street, Calcutta, being therefore excluded.

The mortgage now sued upon was executed the same day. It purports to be signed by Fatima Begum on her own behalf, and as guardian of her minor sons.

Her signature is witnessed by her brother and the other witnesses, who are described as identifying her before the Registrar, and is also signed by Syed Mohamed Mirza.

The very first recital in this deed is that Zaigham-ud-Daula died a natural death in Lucknow on the 1st August, 1898, leaving him surviving his widow, the declarant, his two minor sons, and Nawab Sultan Mirza, his major son, and Raushan Ara Begum, his major daughter, as his heirs. It is further recited that the District Judge, under the provisions of the 31st section of the Act 8, 1890, ordered the declarant to contract a debt of 16,000 rupees on the security of the property of the minors; and that, in compliance with that order and with a view to raise money to pay off the amount due on a certain decree named, she mortgaged her own share in these properties.

In their Lordships' view, the only reasonable inference to be drawn from these documents and proceedings is that Fatima Begum, if aware of the purport and contents of this trust deed, consistently treated it as invalid, and never, with full knowledge of its purport and effect—or, indeed, at all—elected to accept the provision made by it for her and her children as a satisfaction of the unpaid balance of her dower. If she was never fully informed of its purport and contents, any election by her to accept the provision made for herself and her children by it in discharge of the unpaid balance of her dower would, of course, be of no avail. If this be so the mortgagee's rights cannot be affected, or his security invalidated, by any course of action she might have chosen to take after the execution of the mortgage. As regards the receipt of the rent or income of the property mortgaged, it must be borne in mind that Fatima Begum would have been entitled to an eighth share of it and her sons to their shares of it, even if the trust deed had never existed; and that she, as their guardian, would have been entitled to be paid their share as well as her own, while under the trust deed the trustees or she herself, with their permission, would have been entitled to receive the entire income, so that the receipt by her of a portion of the income of any of the property comprised either in the trust deed or in the mortgage might be equally consistent with her title under the deed or independent of it, and therefore no proof at all of possession under it. In the mortgage deed of the 13th September, 1902, it is recited that a lease of the Kothi, 13, Russel Street, in the city of Calcutta, was executed on the 19th April, 1901, ten months after the date of the appellant's mortgage. The witness, Madho Lal Dagar, proves, no doubt, that he has received the rent due under this lease on behalf of the trustees since the 13th September 1902.

The letters from the agents of the Bank of Bengal at Lucknow

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to the trustees acknowledging the receipt from the branch of their bank at Calcutta of different sums to be placed to their credit range from the 21st August, 1901, to July 1902. It is not shown precisely what was the true nature of these lodgments in the bank at Calcutta, but from their dates and amounts and the place of lodgment the inference probably would be that they were the rents of the only property belonging to the deceased Nawab situated in Calcutta. The evidence of Medi Ali Khan on this point is very unsatisfactory. At p. 377 he states that after the Nawab's death he was accustomed personally to bring from Hakem Safdar Husain the shares of Fatima Begum and her two sons in the profits of the *jagir* villages. He then appears to have added that he got the profits for Fatima Begum without any specification as to whose profits they were, and then, having been reminded of his former answer, he said it was true, that both answers were true. Under the trust deed Fatima Begum would have been entitled to all the income, her sons to none of it, so that this evidence is more consistent with the lady's taking against the trust deed than under it. There is no satisfactory evidence therefore, in their Lordships' opinion, that the trustees ever entered, under and by virtue of the trust deed, into receipt of the rent or income of the property comprised in the mortgage sued upon, and consequently that there is no satisfactory proof that the possession of this portion of the property, the subject of the gift, was ever delivered by the settlor to the trustees.

Even if the proof of the receipt of the rent of the Kothi, 13, Russel Street, Calcutta, were so satisfactory as to support the conclusion that possession of it had been delivered to the trustees at the date of the trust deed, or indeed at any time during the lifetime of the settlor, which, in their Lordships' view, it is not, the receipt of the rent of these premises, differing altogether as they do in nature and character from the property mortgaged, separated by many miles from these *jagir* villages, and not forming with them one concrete whole, would furnish no proof whatever of the delivery by the settlor to the trustees of his shares in the villages mentioned in the mortgage. Their Lordships are, therefore, of opinion that possession of the property mortgaged not having been proved to have been delivered, the gift is, according to the Mahommedan Law applicable to the case, void, and that the mortgage sued upon is therefore a valid and a binding instrument, and a good security.

The only question remaining for consideration is the legitimacy

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of Sultan Mirza. The burden of proving his illegitimacy rests, according to the pleadings in the first instance at all events, on the plaintiffs in the second suit. It would appear to their Lordships that a fallacy underlies some of the arguments addressed to them on behalf of the respondents on this point. It consists in assuming that the fact, even if true, that Sultan Mirza was treated by the Nawab, and especially by his family, with less care, kindness, consideration, and respect than the sons of the high-born ladies to whom the Nawab had been united by *nikkai* marriages, furnishes proof of Sultan Mirza's illegitimacy. Under the Mahommedan Law and indeed under the English Law, the legitimate son of the most low born, debased, and degraded woman to whom a man could be lawfully united has just the same proprietary right in his father's property as if his mother had been the most well-born and the purest. But it is rather against human nature to suppose that this equality before the law should secure equality of treatment in the domestic circle. It was also urged that the treatment which Sultan Mirza and his mother received in the Nawab's family was quite inconsistent with his position as the legitimate son of the Nawab, and of her position as the legitimate wife, through a *muta* marriage, of the Nawab. The misfortune of that argument is that the position in the family of both Sultan Mirza and his mother, and the treatment both received, especially the latter, is still more inconsistent with her being, as the respondent alleged, the mistress of a menial servant, and he the offspring of their intercourse. Even while she was pregnant with child she was permitted privileges which it is almost impossible to believe would have been accorded to her if, her state being known, as it must have been, it was attributable to her improper intimacy with a menial servant. Sultan Mirza, when he grew up, turned out to be rather a "mauvais sujet." His connection with theatres displeased the Nawab. His mother had eloped or disappeared. If he was the illegitimate son of the menial servant there was no reason why the Nawab should not have turned him adrift. On the contrary he kept him on in his (the Nawab's) home, undoubtedly associated, to some extent, with him, had him about his person, and, it is apparent on the evidence, had some regard for him. In their Lordships' view the reasonable inference from all the evidence on this point is that Sultan Mirza was, at all events, the son of Zaigham-ud-Daula and the negress.

The crucial question then is, was he the Nawab's legitimate son? There is no question that the Sultan Mirza was the son of this woman. That is admitted by all parties. Now four witnesses

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have proved distinctly that the Nawab aknowledged him to be his son. That *prima facie* means his legitimate son: *Fuzeelun Beebee* v. *Omdah Beebee* (1).

The first of these witnesses, Nawab Faghfur Mirza, the son of Prince Mutaz-ud-Daula, belonging to the family of the Kings of Oudh, states that he knew Zaigham-ud-Daula for thirty to thirty-five years, that he knew Sultan Mirza and his mother, that he saw the Nawab and Sultan Mirza treating each other like father and son, that he went to see the deceased Nawab in his last illness, and then found Sultan Mirza attending him, that the Nawab had been displeased with Sultan Mirza because the latter had become addicted to singing and dancing, but that as far as the witness could judge the Nawab had forgiven him, that fifteen or sixteen years had elapsed since then, and that the Nawab on one occasion introduced Sultan Mirza to the witness as his son. The second witness, Khan Bahadur Shujaat Ali Khan, states that Zaigham-ud-Daula told him that the negress, the Sultan Mirza's mother, was his *muta* wife, that he saw Sultan Mirza visiting the family in which Raushan Ara Begum lived at Murshidabad, and that this family treated him as a son, as did also Zaigham-ud-Daula himself.

The third witness, Husain Ali Mirza, son of the Nawab Nazim of Bengal, states that Raushan Ara Begum was married to Mirza Kamyal Baksh, son of the late King of Oudh; that he knew Sultan Mirza; that he saw him with his father Zaigham-ud-Daula, who told the witness that Sultan Mirza was his son by a *muta* woman; and that he saw him once or twice visiting at Murshidabad during Zaigham-ud-Daula's lifetime. This witness was subjected to a cross-examination, presumably considered effective, as to the time of the day at which the deceased Nawab made this statement to him. The last of these witnesses is Munshe Salig Ram. He says that one day, about fourteen or sixteen years before he gave his evidence, he, jesting, asked Zaigham-ud-Daula whence he got this boy Sultan Mirza, and he replied that he was his son by an Abyssinian, his wife by *muta*, presented to him by his, the Nawab's, father, that he saw Sultan Mirza many times, and saw his father treat him as a relation, a son, or brother, and not as a servant.

The Subordinate Judge, at pages 530-535, has criticised in detail the evidence in conflict with these statements, and shows conclusively, their Lordships think, that much weight cannot be attached to it.

Putting aside Sultan Mirza's own evidence, their Lordships

(1) (1868) 10 W. R. 469.

cannot find anything in the case to discredit the evidence of the four witnesses above-named. They have no interest to induce them to state what they do not believe to be true. The criticism passed upon their evidence was, first, that Sultan Mirza was only introduced to each of them once, and therefore their recollection is unreliable, as if it was to be expected that a father would naturally introduce a son to a friend as his son more than once; and, second, that they speak to what took place many years ago. They profess, however, to have a clear recollection of the events they depose to; and the Subordinate Judge, who had the advantage of seeing and hearing them, believed them. Much reliance was placed upon two documents in addition to the trust deed, which, it was contended, contained a distinct repudiation by Zaigham-ud-Daula of Sultan Mirza's legitimacy, namely, the Tarikh Quaisara and the memorandum bearing date the 15th Februaiy, 1893. Both these documents were composed many years subsequent to the dates of the acknowledgments deposed to by the four witnesses mentioned. In the first he names his children by his first wife and those by Fatima Begum, and states that there can be no heirs to him but these; that these persons are the owners of and heirs of his property; and that if any other claimant comes forward his claim should be considered invalid by the Government.

In the memorandum he states that one of his sons by his first marriage having died, his three sons, one daughter, and his wife Fatima, five persons in all, are his heirs, and he proceeds to declare that besides these he has none, and that if any added person comes forward as his heir other than a son or daughter thereafter born to him by his wife Fatima Begum, his claim shall be considered false and unlawful.

It is quite evident from these documents that Zaigham-ud-Daula was very apprehensive that some person would come forward claiming to be his heir, else it would be meaningless and purposeless to write thus. These apprehensions and fears would have been irrational if the person whose claim he desired to defeat was the well-known progeny of the negress and a menial servant. But his fears could easily be accounted for, if in fact he had had a son by a *muta* wife whom he had treated to some extent as a son, and who by reason of that treatment might be a formidable claimant, but yet whose claims he desired, not unnaturally perhaps, to discount. Their Lordships do not think that the evidence of the four witnesses above-mentioned is rebutted or discredited by these documents.

If this be so, the rule of the Mahomedan Law applicable to the

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case is well established: No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible. *Muhammed Allahdad Khan* v. *Muhammed Ismail Khan* (1), *Nawab Muhammad Azmat Ali Khan* v. *Musamut Lalli Begum* (2).

It is also well established according to Mahomedan law that if a member of a family, such as Fatima Begum was of her husband's family, makes statements touching the sonship or heirship of a person, such as are contained in many of the written documents she has signed, in reference to Sultan Mirza's heirship, those statements are good evidence of the family repute concerning him. *Anjuman Ara Begum* v. *Sadik Ali Khan* (3) and *Baker Ali Khan* v. *Anjuman Begum* (4).

On the whole case, therefore, their Lordships are of opinion that the decrees appealed from in these consolidated appeals are both erroneous and should be reversed, and the decrees of the Subordinate Judge in both should be restored, and that both appeals should be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

Their Lordships, however, do not think that they can, consistently with their duty as members of this appellate tribunal, part with this case without making a few observations on some remarkable features of the litigation out of which the appeals have arisen. First as to the question of the duration of the litigation. The first suit was instituted on the 30th April, 1907. Various applications were made by the parties for extension of time. The issues were fixed on the 26th August, 1907. On the 19th June, 1908, the hearing began, and judgment was delivered by the Subordinate Judge on the 25th October, 1909, two years and five months after the institution of the suit. The petition of appeal to the Court of Judicial Commissioner was lodged on the 28th January, 1910, and judgment of the Court was not delivered till the 13th November, 1911.

An application for liberty to appeal to His Majesty in Council was lodged on the 19th December, 1911. Permission was given on

(1) (1888) I. L. R. 10 All. 289.
(2) (1881) L. R. 9 I. A. 18 to 78.
(3) (1899) 2 Oudh Cases 115, (117, 123, 125).
(4) (1903) L. R. 30 I. A. 94 to 103.

the 13th December, 1912, but the notice that it had been given was not served upon the respondents till the 23rd January, 1913.

The petitions of appeal were lodged at the Privy Council Office on the 15th April, 1914, but the appeals were not set down for hearing till the 27th October, 1915, that is about eight years and six months after the institution of the suit.

The second suit was instituted on the 22nd February, 1908. The issues were settled on the 30th March, 1908. The hearing apparently began on the 11th June, 1908, and continued at intervals till the 27th June, 1909 It was taken up for argument early in July, 1909, was adjourned till the 21st of that month, and judgment was not delivered till the 25th October, 1909. The petition of appeal to the Court of the Judicial Commissioner was not lodged till the 27th January, 1910, and judgment was not given till the 13th December, 1911.

Such delays as these are discreditable to any judicial system, and their Lordships have no reason to think they are not to a large extent avoidable. They vastly increase the costs, keep litigants in a state of anxious uncertainty, and prejudice their interest in many ways. Next, the cross-examination of witnesses was so unduly prolonged by the repeated asking of frivolous and irrelevant questions, that witnesses had to be recalled two or three times, often at considerable intervals, before their cross-examination was concluded, and, when recalled, the questions already asked and answered were often repeated. The cross-examination was thus broken up into several detached portions. If it were specially designed, as their Lordships are confident it was not, to expose witnesses to the risk of being tampered with, and to promote the fabrication of false evidence, no better system could be devised for that end than this splitting up of the cross-examination of witnesses.

Again, though the application to examine Fatima Begum may possibly have been rightly refused in the first instance, having regard to the time it was made, their Lordships cannot but regret that after the case had progressed, and everyone saw, as they must have seen, that it was vital to obtain her evidence, the Subordinate Judge did not announce to the parties that he was then ready to give permission to have her evidence taken, and did not impress upon the respondents in the first suit that as they sought to have declared void the solemn deed this lady had entered into, and on the faith of which she had obtained the appellant's money, it was their duty to examine her to explain the circumstances under which she entered into it. That was not done, however. The defendants did not

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again apply, and the case proceeded to drag slowly on without the evidence of the witness who knew all about the facts, and whose evidence would probably have put an end to the controversy one way or another in a few hours.

Finally, their Lordships feel bound to criticise adversely a practice followed in these two cases, which is as illegal as it is slovenly and embarrassing. By the 141st section of "The Civil Procedure Act, 1877," repeated in "The Civil Procedure Code of 1882," and practically re-enacted in order 13, rule 4, of the rules and orders passed under the Code of Civil Procedure of 1908, it is provided that a presiding Judge shall endorse with his own hand a statement that it (*i e*, a document proved or admitted in evidence) was proved against or admitted by the person against whom it was used. That course was in many instances not followed at the hearing of these two cases, with the result that embarrassing and perplexing controversies arose on the hearing of these appeals as to whether or not certain documents, prints of which were bound up in the record, had been given in evidence. There is no possible excuse for the neglect, in this manner, of the duty imposed by the statutes, since so long ago as the 3rd March, 1884, a circular was addressed by the then Registrar of the Privy Council to the Registrar of the High Court of Calcutta calling attention to the requirements of the then existing law and the necessity of observing them. A copy of this circular was sent not only to the High Courts of Madras, Bombay, and Allahabad, but, in addition, to the Judicial Commissioner of Oudh and other Judicial Commissioners. Their Lordships, with a view of insisting on the observance of the wholesome provisions of these statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required.

Watkins & Hunter: Solicitors for the Appellant.

Barrow Rogers & Nevill: Solicitors for the Respondents.

J. M. P. *Appeals allowed.*

APPELLATE CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

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May, 12.

GANGA NARAIN DUTT

v.

INDRA NARAIN SAHA AND OTHERS.*

Possession, suit for—Hindu widow—Alienation with consent of next reversioner—Mortgagee, suit by—Next reversioner, a party—Mortgage decree, effect of—Sale in execution of mortgage decree—Next reversioner, a proper party—Auction-purchaser, a third party—Actual reversioner, when can set aside decree and sale.

When a mortgagee from a Hindu widow seeks to obtain a decree which would bind not merely the qualified interest of the widow, but the entire inheritance itself, the then reversioner is a proper party to the suit.

Cases on the point referred to.

A reversioner so impleaded, may be deemed to be a party in a representative capacity [*Venkatanarayana* v. *Subbammal* (1) referred to]. And a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow. The title of the purchaser in execution of such a decree can be successfully impeached for fraud, collusion or other like reason.

Obiter: If, at the time when the mortgage was executed, there was really no legal necessity for the loan, and yet the widow and the immediate reversioner colluded to raise the money and to charge the inheritance so as to enable the reversioner to embark upon a speculation for his personal benefit, the fact that the parties had gone through the form of a suit and a decree, could not prejudice the right of the actual reversioner. *Katama* v. *Raja of Shivagunga* (2) referred to.

Appeal by the Plaintiff.

Suit to recover possession of plaintiff's share of the tank on the ground that the widow had no legal necessity for the mortgage. The widow and the next reversioner executed in favour of one Anant, a mortgage of the disputed land to secure a loan of Rs. 499. The mortgagee sued the widow and the next reversioner and obtained the usual mortgage decree. In execution of that decree, the property was sold by the Court and was purchased by the defendants respondents. The reversioner died after the sale and the widow died after him. The plaintiff was one of five persons who, upon the death of

* Letters Patent Appeal No. 116 of 1913, against the judgment of Mr. Justice Harinath Roy, dated the 22nd August, 1913, in Appeal from Appellate Decree No. 3452 of 1911, against the decree of B. C. Mitter Esq., District Judge of Birbhum, dated the 18th September, 1911, reversing that of Babu Hemanta Kumar Haldar, Munsiff of Suri, dated the 30th July, 1910.

(1) (1915) I. L. R. 38 Mad. 405 P. C.; 21 C. L. J. 515.
(2) (1863) 9 M. I. A. 539 (604); 2 W. R. P. C. 31.

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the widow, succeeded to the estate, as reversionary heirs in their character of owner's sister's sons. The primary Court decreed the suit. This decree was reversed on appeal and a second appeal to the High Court was dismissed by the following judgment of

Ray, J.—One Ram Sankar died in 1294 leaving a widow Brahmamoyee and a daughter's son Ram Gopal Sen. The widow and Ram Gopal Sen jointly executed a mortgage deed on the 31st May 1896 by hypothecating a tank for Rs. 499. This tank was the property of Ram Sankar and was in the possession of Brahmamoyee as his heiress. The mortgagee sued the widow and the then reversionary heir Ram Gopal Sen upon the mortgage and brought the property to sale on the 6th June 1905. The defendants Indra Narain Saha and others became the purchasers at the sale and entered upon possession. The price paid was Rs. 1270. Ram Gopal predeceased the widow Brahmamoyee who died on the 21st July 1909. The plaintiff and others are the present reversioners to the estate of the late Ram Sankar Roy. The share of the plaintiff is 3 annas and 4 gundas. He instituted this suit to recover his share of the tank on the ground that the widow had no legal necessity for the mortgage. The first Court decreed the suit. On appeal the learned District Judge dismissed it and hence this second appeal to this Court.

It is contended that as the finding of the learned District Judge is that there was a legal necessity for part of the loan raised by the mortgage he ought to have determined the amount of it and made a decree accordingly. On the side of the respondents it is argued that the whole property has passed to them and that the plaintiff cannot recover anything. I find from the judgment of the learned District Judge that the mortgage suit was so framed that the sale in execution of the decree upon the mortgage passed the entire right to the purchaser. The learned District Judge had the plaint of the mortgage suit before him and his conclusion is based upon it. If that was so, then there can be no question that the whole property went to the purchaser. There is no allegation of fraud or collusion and the result must necessarily be what the learned District Judge has arrived at.

When disposing of the appeal the learned District Judge had not the advantage, which I possess now, of the decision of a Full Bench in the case of *Debi Prosad Chowdhry v. Golap Bhagat* (1). In the circumstances of the present case a stong presumption of legal necessity arose in favour of the mortgagee and the auction-purchaser. It was for the plaintiff to rebut this presumption by cogent evidence.

(1) (1913) 17 C. L. J. 499.

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The learned District Judge has found as a fact that apart from this presumption there was evidence of legal necessity for part of the mortgage money. He could not find upon the evidence adduced in the suit whether the remainder of the debt was for legal necessity or not. If he applied the presumption in favour of the purchaser then there having been no proper evidence of rebuttal the decision should necessarily be in favour of the defendants. I hold, therefore, that the judgment of the District Judge is correct and that the appeal must be dismissed with costs.

Against this judgment, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babu Bepin Behary Ghose for the Appellant.

Babu Surendra Nath Ghosal for the Respondents.

The judgments of the Court were as follows:

May, 12.

Sanderson, C. J.—In this case, I think this appeal must be dismissed, inspite of the interesting argument which has been presented to us by the learned vakil for the appellant, and the short ground is that there was a decree in the mortgage suit in which the defendants were not only the widow but also the then reversioner. The decree must therefore be taken to bind the whole estate. Under that decree a sale was held and a third party purchased the estate: and, it seems to me that as long as that decree stands, and until that is set aside for good grounds, the present plaintiff cannot get behind it and maintain the present suit. For this reason I think that the appeal should be dismissed with costs.

Mookerjee, J.—I agree that this appeal must be dismissed.

The property in dispute belonged originally to one Ram Sankar Roy who died in 1887. He left a widow Brahmamoyi and a daughter's son Ram Gopal Sen. On the 13th May, 1896, Brahmamoyi and Ram Gopal executed in favour of one Anant Lal Das, a mortgage of the land in suit to secure a loan of Rs. 499. In 1902, the mortgagee sued the widow and her daughter's son to enforce the security, and obtained the usual mortgage decree. In execution of that decree, the property was sold by the Court on the 6th June 1905 and was purchased by the Shahas, now defendants-respondents. The grandson died in 1906, and the widow died on the 21st July, 1909. The plaintiff is one of five persons who, upon the death of the widow, succeeded to the estate of Ram Sankar Roy, as reversionary heirs in their character of his sisters' sons. On the 20th September, 1909 he instituted the present suit to recover the property from the purchasers, on the allegation that there was no legal

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necessity for the loan and that the mortgage and sale took place under circumstances which do not make those transactions binding upon him as one of the actual reversioners. The Court of first instance decreed the suit. Upon appeal that decree was reversed by the District Judge, and a second appeal to this Court was dismissed by Mr. Justice Roy.

On the present appeal, preferred under clause 15 of the Letters Patent, it has been argued by the plaintiff that the case has not been examined in the Courts below from the proper point of view. There is some force in this contention, and the reason is not far to seek. The case was heard by the District Judge, as also by Mr. Justice Roy, before the decisions of the Judicial Committee in *Harikishen* v. *Kashi Pershad* (1), and *Bijoy Gopal* v. *Girindra Nath* (2), and of the Full Bench in *Debi Prosad Chowdhury* v. *Golap Bhagat* (3), as to the precise effect of an alienation by a Hindu widow with the concurrence of the then next reversioner. *Prima facie*, therefore, the appellant is entitled to claim a remand for reconsideration of the questions in controversy. But, upon the admitted facts, I think, it is reasonably plain that the plaintiff cannot possibly succeed in this litigation and a remand would be of no avail to him.

The mortgage, as we have seen, was executed by the widow and the then next reversioner; the suit was instituted and the decree was obtained against them. Neither at the time of the execution of the mortgage nor at the date of the institution of the suit had the plaintiff any present interest in the property; he was then not even the immediate reversioner; he was only a reversioner in the second degree. He was not a party to the mortgage transaction, nor was he a necessary party to the mortgage suit. On the other hand, Ram Gopal Sen, the daughter's son of the original owner and the then next reversioner, was joined as a party to the mortgage transaction and to the mortage suit, with a view to bind the entire inheritance. We have, consequently, a decree, made by a competent Court in the presence of the widow and the then next reversioner; the decree directed the sale of the entire inheritance; and at the sale, which was held by the Court the respondents purchased the property. What then is the true position of the purchasers? In the first place, when a mortgagee from a Hindu widow seeks to obtain a decree which would bind not merely the qualified interest

(1) (1914) L. R. 42 I. A. 64; I. L. R. 42 Calc. 876; 21 C. L. J. 225.

(2) (1914) I. L. R. 41 Calc. 793; 19 C. L. J. 620.

(3) (1913) I. L. R. 40 Calc. 721; 17 C. L. J. 499.

of the widow, but the entire inheritance itself, the then next reversioner is a proper party to the suit: *Nugender* v. *Kaminee* (1); *Brij Bhookun* v. *Mohadeo* (2); *Mohima* v. *Ram Kishore* (3); *Srinath* v. *Hari Pada* (4); *Bhagirathi* v. *Baleshwar* (5); *Rameswar* v. *Provabati* (6); *Indar Kuar* v. *Lalta Prasad* (7); *Marudaga* v. *Savadi* (8); *Lloyd* v. *Johnes* (9); Story on Equity Pleadings, article 144; Daniell on Chancery Practice, Chapter III., section 3. In the second place, a reversioner so impleaded, may well be deemed a party in a representative capacity. *Venkatanarayana* v. *Subbamal* (10)] and a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow [Jones on Mortgages, section 1439]. The title of the purchasers in this case can consequently be defeated by the plaintiff, only after the decree, which is the root of that title has been successfully impeached for fraud, collusion or other like reason. Assume that the plaintiff might possibly have attacked the decree on the ground of fraud, for instance, on the allegation that at the time when the mortgage was executed, there was really no legal necessity for the loan, and yet, the widow and the immediate reversioner colluded to raise the money and to charge the inheritance so as to enable the reversioner to embark upon a speculation for his personal benefit. If this were established, the fact that the parties had gone through the form of a suit and a decree, could not justly be held to prejudice the right of the actual reversioner: *Katama* v. *Raja of Shivagunga* (11). No such case of fraud, however, has been charged, much less proved, and the mortgage and the decree thereon still stand unassailed; clearly so long as the decree stands, the plaintiff cannot successfully impeach the title of the defendants. In this view, the suit fails and has been rightly dismissed; consequently the present appeal must be dismissed with costs.

A. T. M. *Appeal dismissed.*

(1) (1867) 11 M. I. A. 241; 8 W. R. P. C. 17. (2) (1872) 17 W. R. 422.
(3) (1875) 23 W. R. 174; 15 B. L. R. 142. (4) (1899) 3 C. W. N. 637.
(5) (1913) I. L. R. 41 Calc. 69; 19 C. L. J. 155.
(6) (1914) 20 C. L. J. 23 (31). (7) (1882) I. L. R. 4 All. 532.
(8) (1910) I. L. R. 34 Mad. 188. (9) (1802) 9 Ves. 37 (57).
(10) (1915) I. L. R. 38 Mad. 406; 21 C. L. J. 515.
(11) (1863) 9 M. I. A. 539 (604); 2 W. R. P. C. 31.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

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August, 18.

ABU HAMID ZAHIR ALA

v.

GOLAM SARWAR.*

Award—Application for enforcement of award—Presence of all arbitrators, if necessary.

Inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made ; the operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a majority award ; even where less than the whole number of arbitrators make a valid award, they cannot do so without consulting the other arbitrators.

Application for enforcement of a private award.

The material facts and arguments appear from the judgment.

Babus Mahendra Nath Ray and *Satis Chunder Mukherjee* for the Appellant.

Babu Rishindra Nath Sarkar for the Respondent.

The judgment of the Court was delivered by

August, 18.

Mookerjee, J.—We are invited in this appeal to consider the propriety of an order of dismissal of an application under paragraph 17 of the second schedule to the Civil Procedure Code, 1908, for the enforcement of a private award. The relevant portion of the agreement of reference was in these terms :

"Considering it desirable to decide the matters in dispute by arbitrators and so appointing the above-mentioned gentlemen as arbitrators we execute this deed of reference and agree that the award which all the arbitrators unanimously or the majority of the arbitrators will make will be accepted as a decree of a superior Court and will have force and be valid at all places. In case of difference of opinion among the arbitrators, the majority of them will make and be competent to make their award unanimously. To that no objection by any of us will be entertained nor shall we be competent to make any." Under this instrument, five gentlemen were appointed arbitrators, three of whom alone signed the award.

* Appeal from Original Order No. 291 of 1914, against the decision of Babu Umes Chunder Chuckerbutty, Subordinate Judge of 24-Pergunnahs, dated the 23rd May, 1914.

The application with which we are now concerned was made for the enforcement of this award. The defendant objected that there was no valid award in law because two of the arbitrators had not attended all the sittings and one at least did not take part in the final deliberations. The plaintiff contended that inasmuch as the three arbitrators who had made the award had attended all the meetings, and as a majority of the arbitrators was competent to make a valid award, the award was legal and enforceable. The Subordinate Judge has overruled these contentions on the ground that all the arbitrators should be present at all the meetings and particularly at the last when the final act of arbitration is done, though as a result of this united deliberation there may be an award by a majority only of them. In our opinion, the view taken by the Subordinate Judge is correct

It is now firmly settled, as ruled in *Nand Ram* v *Fakir Chand* (1) that when a case has been referred to arbitration, the presence of all the arbitrators at all the meetings and above all at the last meeting when the final act of arbitration is done is essential to the validity of the award There the case had been referred by the Court to the arbitration of three persons and the parties had agreed to be bound as to the matters in dispute by the decision of the majority One of the arbitrators subsequently refused to act and withdrew from the arbitration Oldfield and Mahmood JJ held that the award of the majority was not binding A similar view was taken in *Sreenath Ghose* v *Raj Chunder Paul* ( ) Our attention however has been drawn to the earlier decision in *Kasee Naser Ali* v. *Zinoo* (3), as an authority for the contrary position. We are of opinion that this case is clearly distinguishable, and is an authority only for the proposition that an award of arbitrators cannot be set aside on the ground that it is erroneous or that only two out of three arbitrators signed the award when the parties agreed to abide by the decision of the majority There is nothing to indicate that the arbitrator who did not sign the award had not taken part in the deliberations. The principle which underlies the view we take is best stated in the words of Russell which have now became classical, quoted as they were with approval in *Beck* v. *Jackson* (4) and *Khelut Chunder Ghose* v *Tarachurn Koondoo* (5): "As the arbitrators must all act, so must they all act together. They must each be present at every meeting, and the witnesses

(1) (1885) I. L. R. 7 All. 523. (2) (1867) 8 W. R. 171.
(3) (1866) 6 W. R. 95 (4) (1857) 1 C. B N. S. 695
(5) (1866) 6 W. R. 269 (272)

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and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the argument experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow Judges so that by conference they shall mutually assist each other in arriving at a just decision.' The same point of view had been emphasised in *Dalling* v. *Matchett* (1), where the Court of Common Pleas observed as fellows: "It has often been said that if that one had been present," that is, the arbitrator who did not attend, "he could not by his vote have turned the majority the other way, when all the rest were unanimous; yet it has always received this answer that every one has a right to argue and debate as well as to give his vote and it is possible at least that the person absent may if he had been present at the meeting, have made use of such arguments as may have brought over the majority of the rest to be of his opinion." The matter was put substantially in the same way in *In re Pering* (2). Lord Denmen observed: "any two under such submission as this, that is, a submission which provides for a valid award by the majority, may make a good award. But then it must be after discussion with the other arbitrators. If after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him." Coleridge J. added: 'The parties have not got what they stipulated for. They stipulated that two at least should make the award, but no two could make it till each arbitrator had been consulted.' This view accords with that adopted in *Peterson* v. *Ayre* (3); *White* v. *Sharp* (4); *In re Templeman* (5); *Burton* v. *Knight* (6); *Morgan* v. *Bolt* (7) and *Doberer* v. *Megaw* (8).

We adopt the principle that inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made; the operation of this rule is in no way affected by the fact that authority

(1) (1740) Willes 215. (2) (1835) 3 Ad. & E. 245.
(3) (1854) 14 C. B. 665; 2 C. L. R. 722; 23 L. J. C. P. 129; 2 W. R. (Eng). 373.
(4) (1844) 1 C. & K. 348. (5) (1841) 9 Dowling P. C. 962.
(6) (1705) 1 Eq. Ca. Abr. 50 pl. 6; 2 Vernon 514.
(7) (1863) 7 L. T. N. S. 671. (8) (1903) 34 Can. S. C. 125.

is conferred upon the arbitrators to make a majority award; even where less than the whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrators. The inference follows that in the present case there is no valid award.

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The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at five gold mohurs.

A. T. M. *Appeal dismissed.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

CIVIL. 1916. June, 22.

FULSUMMANNESSA BIBEE

v.

HALAMADDI MOLLA AND OTHERS.*

Second appeal—Civil Procedure Code (Act V of 1908), Sec. 104 (2), O. 21 R. 90—Fraud in publishing sale proclamation—Fraud, allegation of, of more comprehensive scope—Fraud antecedent to the publication of sale.

The character of a decision of a question within the scope of rule 90 of order 21 of the Code of Civil Procedure is not altered by an allegation of fraud of a more comprehensive scope.

No second appeal by a decree-holder lies under section 104 (2) of the Code of Civil Procedure against an order based on the ground of fraud in the publication of sale, although there was allegation of fraud of a wider scope imputed to the decree-holder, *viz.*, that the decree-holder had taken out execution though his decree had been satisfied in full, out of Court.

Quaere: Whether the decision of a question of fraud antecedent to the publication and conduct of the sale brings the case within the scope of section 47 of the Code of Civil Procedure.

Appeal by the Decree-holder.

Application by the judgment-debtor to set aside an execution sale.

The material facts and arguments appear from the judgment.

Babu Harendra Krishna Mukherjee for the Appellant.

None for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—We are of opinion that this appeal is barred under sub-section 2 of section 104, Code of Civil Procedure. The appellant was the decree-holder in the Court below, and at his

June, 22.

* Appeal from Appellate order No. 477 of 1915, against the decision of Babu Lalit Mohan Das, Subordinate Judge of Khulna, dated the 26th August, 1915, reversing that of Babu R. N. Dhar, Munsiff of Bagerhat, dated the 24th February, 1915.

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instance the property of the judgment-debtors was sold in execution on the 17th July, 1912. On the 25th April, 1914, the judgment-debtors applied to have the sale set aside, on the ground that it was vitiated by material irregularity and fraud in publication. But they also alleged fraud of a more comprehensive character, *viz.*, that the decree-holder had taken out execution, though his decree had been satisfied in full, out of Court. The trial Court dismissed the application. On appeal the Subordinate Judge held that the allegation that the decree had been satisfied in full was not established. He came to the conclusion, however, that the sale proclamation had been fraudulently suppressed, and that the property had been purchased by the decree-holder at a price much lower than its proper value. On these findings, the Subordinate Judge has set aside the sale under rules 90 and 92 of order 21 of the Code. On the present appeal it is contended that the case falls beyond the scope of rule 90 of Order 21 and comes within the scope of section 47, in so far as the judgment-debtors impeached the sale on the ground of fraud antecedent to its publication and that, in this view, the order of the Subordinate Judge is a decree within the meaning of section 2 of the Code of Civil Procedure and is appealable as such. It is not necessary to determine, whether the decision of a question of fraud antecedent to the publication and conduct of the sale brings the case within the scope of section 47; for it is plain that in so far as fraud was imputed in connection with the publication of the sale, the case is covered completely by rule 90. The order of the Subordinate Judge, in so far as the case was within the scope of rule 90, was thus an order under that rule, and that rule alone. We cannot hold that by reason of an allegation of fraud of a more comprehensive scope, the character of the decision of the question within the scope of rule 90 was altered. The order of the Court of first instance was thus open to appeal under order 43 rule 1 (j), and the order passed in appeal was final under section 104 (2). Consequently, the present appeal is incompetent in so far as the case is within the scope of rule 90. As the validity of the order cannot be assailed in second appeal, when regarded as an order based on the ground of fraud in the publication of the sale, it is immaterial to consider whether fraud of a wider scope imputed to the decree-holder has or has not been established: cf. *Jadab* v. *Joy Gopal* (1). The result is that this appeal is dismissed.

A. T. M. *Appeal dismissed.*

(1) (1913) 19 C. L. J. 81.

CIVIL RULE.

Before Mr. Justice Teunon and Mr. Justice Chaudhuri.

BUDHU LALL

v.

CHOTU GOPE.*

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February,

Vakil's right of audience—Legal Practitioners Act (XVIII of 1879), Sec. 4—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), Sec. 195 (6) and (7) (c)—Revision—Civil Procedure Code (Act V of 1908), Sec. 115—Presidency Small Cause Court's order refusing sanction—Original Side of the High Court, powers of—Practice of the Court.

The applicant applied to the Court of Small Causes, Calcutta, for sanction to prosecute the opposite party under sections 209 and 193 of the Indian Penal Code. The sanction having been refused, an application was made to the original side of the High Court under the provisions of section 115 of the Civil Procedure Code and of section 195 (6) read with section 195 (7) (*c*) of the Code of Criminal Procedure and the Chief Justice constituted two of the Judges of the High Court to hear the application :

Held (Chaudhuri J. dissenting) that a vakil enrolled and ordinarily practising in the High Court was entitled to be heard on behalf of the opposite party. The order sought to be set aside was one made by a Civil Court, and the constituted Bench was sitting as a Divisional Bench in the exercise of the civil and not of the criminal jurisdiction of the High Court. The Divisional Bench so constituted was a superior Court exercising not original but appellate or revisional jurisdiction.

Sarat v. *Brojo* (1) and *Ramadhin* v. *Sewbalak* (2) not followed.

Per Chaudhuri J: The constituted Bench sat as the principal Court of original jurisdiction situate in Calcutta, to hear the application, exercising such jurisdiction as is ordinarily exercised on that side, and not in the exercise of the criminal jurisdiction of the High Court.

The Presidency Small Cause Court was subordinate to the Original Side of the High Court.

The original side of the High Court could exercise revisional power over the Presidency Small Cause Court, and no special Bench was necessary to be constituted for the purpose.

The Original Side of the High Court is not a Court subordinate to the appellate Bench of the same Court which hears appeals therefrom and an application by way of appeal to it under section 195 of the Code of Criminal Procedure is not competent.

The power of superintendence, direction and control which was possessed by the Supreme Court over the Presidency Small Cause Court, appertains to the original side of the High Court. All such powers when exercised by the

* In the matter of Suit No. 15292 of 1913, of the Presidency Small Causes Court.

(1) (1903) I. L. R. 30 Calc. 908. (2) (1910) I. L. R. 37 Calc. 714.

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original side, are exercised in its original jurisdiction within the meaning of section 4 of the Legal Practitioners Act. The appellate jurisdiction of the Divisional Benches of the High Court is not available in respect of proceedings in connection with the Presidency Small Cause Court.

The High Court inherited all the jurisdiction and every power in any manner vested in the Supreme Court and the Sudder Dewany and Sudder Nizamut Courts. It is the successor of the Supreme Court with the territorial jurisdiction confined to the Presidency town of Calcutta and as the Supreme Court was not a Court which had power of superintendence over the mofussil Courts, the original side did not and does not possess such power, and similarly as the appellate side dealing with appeals from provincial Courts, has no jurisdiction over the Presidency Small Cause Court, the power of superintendence over it, which the Supreme Court had, remained in the original side of the High Court. There are some large powers which still remain in the original side of the High Court as the successor of the Supreme Court, which do not belong to the appellate side of the Court.

The practice of the Court forms the law of the Court.

Section 195 of the Code of Criminal Procedure does not cut down the power which the High Court has under section 115 of the Code of Civil Procedure or its power of superintendence under clause 15 of the High Court Act.

Section 195 sub-sections 6 and 7 of the Criminal Procedure Code deal with a special case of revision. The power is in the High Court; it has not been newly created. It is covered by clause of the High Courts Act, and section 115 of the Code of Civil Procedure and section 195 sub-section 6 of the Code of Criminal Procedure are specific instances where High Court can exercise revisional powers.

A question relating to the rival claims of different sections of legal practioners of the High Court involving rules framed by the Full Court cannot be settled by the opinion of a single Judge or of a Division Bench of the High Court.

Quære: Whether a superior Court has power to remand when the subordinate Court declines jurisdiction on a preliminary point and does not deal with the merits of a matter.

Application for revision under section 115 of the Code of Civil Proceduce.

Application for sanction to prosecute.

Application by the Plaintiff Budhu Lal.

Seven suits instituted by the petitioner in the Calcutta Court of Small Causes against Chattu Gope and others residents outside Calcutta were dismissed on denial of liability by the defendant on special oath by which the plaintiff agreed to be bound. The defendant, Chattu Gope then applied to the Small Cause Court under section 195, Criminal Procedure Code for sanction to prosecute the plaintiff for false statement made on oath in support of the application for leave to institute the suits in that Court. The application for sanction was refused. Chattu Gope thereupon

applied to Mr. Justice Chaudhuri on the Original Side under section 115, Civil Procedure Code, for reversal of the said order. The learned Judge treated the application as one under section 195 (6), Criminal Procedure Code, and set aside the order complained of and directed the Small Cause Court Judge to hold an enquiry into the matter. The plaintiff then appealed against the said order under clause 15 of the Letters Patent. The appellate Bench (C. J. and Mookerjee J.) (1) held that section 115 of the Code of Civil Procedure was inapplicable and that Chaudhuri J. had no power to remand the case for further enquiry under section 195 (6), Criminal Procedure Code. The application to the High Court under section 195, Criminal Procedure Code, was, however, remitted by the Chief Justice to a Division Bench consisting of Teunon and Chaudhuri JJ. to be dealt with according to law.

At the hearing of the application before Teunon and Chaudhuri JJ. on 13th February 1917, an objection was raised on behalf of the Attorneys to the vakils' right of audience in the case on the ground that this being a case on the Original Side of the High Court against an order of the Calcutta Small Cause Court, the vakils were not entitled to an audience according to a long established practice of the Court. Their Lordships thereupon adjourned the case and directed notices to be given to the Advocate-General on behalf of the Advocates and to the Government Pleader on behalf of the vakils.

The matter came on for hearing on the 20th of February, 1917. *The Advocate-General* (*Mr. B. C. Mitter*) on behalf of the Advocates: After stating the facts from the Judgments of Chaudhuri J. and of the Appellate Bench showing how the case comes before the present Bench, reads section 195 (7) (c), Criminal Procedure Code. Submits his arguments are two-fold: (1) The jurisdiction under the section is a civil jurisdiction: (2) cases of revision from the Calcutta Small Cause Court whether under section 115, Civil Procedure Code, or 195, Criminal Procedure Code, appertain to the Original Side of the Court.

As to (1), refers to *Emperor* v. *Har Prasad Das* (2). Though that was a case under section 476, Criminal Procedure Code, the principle laid down there holds good.

As to (2), jurisdiction has always been exercised by the Original Side.

(1) (1916) 25 C. L. J. 193.
(2) (1913) I. L. R. 40 Calc. 477; 17 C. L. J. 245.

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In appeals from the Original Side, the vakils have no audience, and that is reasonable. This revisional jurisdiction is a branch of that jurisdiction which was inherited from the Supreme Court in Bengal. Also reads the proviso to section 4, Legal Practitioners Act, refers to *In the matter of Condas Narrondas* v. *Turner* (1), where it has been held that the insolvency jurisdiction is a part of the ordinary original jurisdiction of this Court. Also Letters Patent cls 15 and 17. Reads from Mr. *Heckle's Rules* at page 34, clause 21 of the Supreme Court's Charter and the notes below. General revisional jurisdiction on the civil side of the Court is exercised by powers conferred upon it as a Court of Original Jurisdiction.

Reads section 9 of the Charter Act. This power can be exercised only by the Original Side. This has been inherited, as held by Sale J. from the Supreme Court.

Refers to Rule V, Chapter II, Appellate Side Rules—as to cases under section 115 of the Civil Procedure Code. How is it that the vakils cannot appear in these cases?

[Teunon J.—Is it not open to us to consider whether Rule V is *ultra vires* or not?]

I am not relying on these Rules.

Refers to *Sarat* v. *Brojo Lal* (2); *Shamsher* v. *Ganendra* (3), where it has been held that the Presidency Group Bench has no jurisdiction over the Calcutta Small Cause Court. If the other side can argue that this matter comes in the exercise of appellate jurisdiction, then I have no case.

[Teunon J.—Is it your case that it is not every Judge of the High Court in whom the jurisdiction of the Supreme Court is vested?]

Only when you exercise original jurisdiction. Where could the application be made before the rule laid down in *Emperor* v. *Har Prasad* (4)? As part of his argument, reads from page 4 of Woodroffe on Injunction—"The Presidency High Courts, in the exercise of their ordinary original civil jurisdiction, may, in such circumstances, have recourse to the equitable jurisdiction which the High Courts have inherited from the Supreme Courts, which were in their turn vested with the general powers of the Court of Chancery," *and refers to the cases cited in the foot-note*; also to page 47 and in that connection relies on *Rash Behary Das* v. *Bhowani* (5);

(1) (1889) L. R. 16 I. A. 156 (162); I. L. R. 13 Bom. 520.
(2) (1903) I. L. R. 30 Calc. 986 (988).
(3) (1902) I. L. R. 29 Calc. 498.
(4) (1913) I. L. R. 40 Calc. 477.
(5) (1906) I. L. R. 34 Calc. 97.

Mongle v. *Gopal* (1), and *Legal Remembrancer* v. *Matilal* (2). Certain powers inherited from the Supreme Court are not exerciseable by your Lordships in all Courts. That branch is now represented by the Original Side and in appeals from the Original Side.

Refers to Appellate Side Rule V of Chapter II., which has been relied on by Mr. Justice Mookerjee. If the Original Side has not got the power of revision, how can this Rule come in?

[Teunon J.—Does Rule V say what jurisdiction the single Judge does exercise or will exercise?]

No.

The jurisdiction of the Supreme Court is exercised by the Original Side as a matter of practice extending over 100 years.

[Chaudhuri J.—Where is that case in appeal from my judgment, where it has been held that practice settling a question of jurisdiction should not be lightly disregarded?]

That is *Rodricks* v. *Secretary of State* (3). Refers also to page 201 of the *Amrita Bazar Patrika Case*: *Legal Remembrancer* v. *Matilal* (2). Referring to section 195 (7) (c), submits, this makes the Small Cause Court subject to the Original Side. The power of superintendence over the Small Cause Court is always exercised by the Original Side.

As regards *Jamna Doss* v. *Sabapathy* (4), we do not know the constitution of the Madras High Court Benches.

The original jurisdiction of the High Court included revision. Reads from Act IX of 1850, sections 9, 11 and 12. Supreme Court had concurrent jurisdiction with the Small Cause Court. Original jurisdiction does not mean only the trial of original suits.

There is another matter. How has the case come before your Lordships now? Mr. Justice Chaudhuri suggested that the application might be headed under section 195, Criminal Procedure Code.

[Teunon J.—Section 195 Criminal Procedure Code does not exclude jurisdiction under section 115, Civil Procedure Code.]

Yes.

In reply to a question from Teunon J, says the general power under clause 21 is continued under section 9 of the Charter Act.

Refers to cl. 12 of the Letters Patent as to the ordinary original jurisdiction of the Court.

(1) (1906) I. L. R. 34 Calc. 101.
(2) (1913) I. L. R. 41 Calc. 173 (201); 18 C. L. J. 452.
(3) (1912) I. L. R. 40 Calc. 308 (317).
(4) (1911) I. L. R. 36 Mad. 138 (140).

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[Teunon J.—What is the value of the suits.]

Above one hundred rupees.

Mr. Buckland on behalf of the Attorneys adopted the arguments of the Advocate-General.

Babu Ram Charan Mitter (the Senior Govt. pleader) (with him *Babus Basanta Kumar Bose, Manmatha Nath Mukerji* and *Ramdoyal Dey*) on behalf of the Vakils' Association :

The principal question for decision is whether the jurisdiction under section 195, Criminal Procedure Code, is ordinary original jurisdiction or otherwise (excluding for the purpose of this matter the case of extraordinaty original and criminal jurisdiction). If it is not ordinary original jurisdiction, which would include also appeal therefrom, then the vakils can be heard. Jurisdiction that is to be exercised is indicated in this case.—Refers to *Budhu Lal* v. *Chotu Gope* (1), which held that the party seeking relief in this case cannot invoke the aid of section 115 of the Code of Civil Procedure and that it is immaterial whether the remedy under section 195 (6), Criminal Procedure Code, is in the nature of appeal or revision. The order therefore shows that revisional or appellate jurisdiction is to be exercised, certainly *not original.* The application is to be dealt with under section 195, Criminal Procedure Code and not under section 115, Civil Procedure Code. Reads cls. 11 and 12 of the Letters Patent, which define the ordinary original jurisdiction of the High Court. Refers to *Kali Kinkar* v. *Dinobandhu* (2)—which held that "High Court" in section 195, Criminal Procedure Code, means the Appellate Side; also to the definition of "High Court" in General Clauses Act, which also means the Appellate Side. Reads section 88 of the Presidency Small Cause Courts Act, showing that appeal lies in some cases from the Small Cause Court to the 'High Court' *i.e.*, to the Appellate Side.

Assuming for the sake of argument that no appeal lies, relies on *Jamna Doss* v. *Sabapathey* (3) ; *Sabhapathi* v. *Narayanasami* (4) and *Chappan* v. *Moidin Kutti* (5), among other cases. "The principal Court of original jurisdiction" in section 195 (7) (c) only designates the Court and not the original side or jurisdiction of it. The jurisdiction exercised is appellate or rivisional distinct from original jurisdiction and revisional jurisdiction is included in appellate jurisdiction under the Letters Patent.

[Advocate-General—I concede that jurisdiction under section 195 in granting or revoking sanction is revisional].

(1) (1916) 25 C. L. J. 193 (197, 202, 204).
(2) (1905) I. L. R. 32 Calc. 379.
(3) (1911) I. L. R. 36 Mad. 138.
(4) (1910) I. L. R. 25 Mad. 555 (558).
(5) (1898) I. L. R. 22 Mad. 68.

Reads section 6, Presidency Small Cause Courts Act; also section 2 and schedules A and B, showing that clause 21 of the Supreme Courts' Charter as well as Act IX of 1850 and Act XXVI of 1864 were simultaneously repealed in 1882.

On the question of the vakils' right of audience, refers to cl. 8 of Letters Patent, 1862; cl. 9 of Letters Patent, 1865; Legal Practitioners Act, section 4 and the proviso; section 119, Civil Procedure Code.

The following cases were also cited: *In the matter of Toolsee Doss Seal* (1) case under cl. 21 of Supreme Courts' Charter on the Appellate Side in which a vakil appeared; *Kadambini Baiji* v. *Madan* (2) case of transfer under section 25 of the Civil Procedure Code of 1882: *Jadu Mani* v. *Ram Kumar* (3); *Shamsher* v. *Ganendra* (4) and *Chaitanna* v. *Halodhur* (5) (which referred to *Shamsher* v. *Ganendra* (4)); *Ananta* v. *Radharani* (6) and *Mangiah Chetty* v. *Ramiah Chetty* (7). Refers also to cases on the Original Side.

Submits that Rule V, Chapter II of Appellate Side Rules, is *ultra vires*.

The Advocate-General in reply: Definition of "High Court" in General Clauses Act only designates the Court *e.g.* the Chief Court of Punjab. Refers to cls. 16and 17 of Letters Patent.

[Teunon, J.—Does not Bengal Division of the Presidency of Fort William include Calcutta Small Cause Court?].

Refers to Heckle's Rules at page 34; also reads cls. 44 and 1 of the Letters Patent. Old jurisdiction was not taken away entirely but to a limited extent. Refers to *Nundo Lal* v. *The Corporation* (8) as to the power of the Court to issue *certiorari*. The Court has inherited this jurisdiction.

[Teunon J.—The case was not before an inferior civil Court?].

No. Reads "It is an authority derived from the Supreme Court."

Regarding the case of *In the matter of Toolsee Doss Seal* (1), submits it was an *ex parte* application without any notice to the advocates.

[Teunon, J.—Observed that the same remark applied to the cases on the Original Side where the vakils could not appear].

(1) (1867) 7 W. R. 228. (2) (1898) 3 C. W. N. 247.
(3) (1902) I. L. R. 29 Calc. 239. (4) (1902) I. L. R. 29 Calc. 498.
(5) (1903) 7 C. W. N. 547; I. L. R. 30 Calc. 588.
(6) (1901) 3 C. L. J. 199. (7) (1908) 18 M. L. J. 565.
(8) (1885) I. L. R. 11 Calc. 275 (278).

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Referring to the *Amritabazar Patrika* case (1), submits these matters can be taken only on the Original Side.

The case of *Kadambini* v. *Madan* (2) has been explained in *Shamsher* v. *Ganendra* (3). It is a mere question of transfer: *Jadu Mani* v. *Ram Kumar* (4) has been explained in the case of *Samsher* v. *Ganendra* (2), and it has been held Presidency Group Bench had no jurisdiction. As an additional matter, refers to section 69, Presidency Small Cause Courts Act and the expression "High Court" therein. That jurisdiction has always been exercised by the Court of appeal from the Original Side.

Refers to section 195 (7) (*c*)—"within the local limits of whose jurisdiction &c."

[Teunon, J.—Have you considered the effect of the proviso to section 4 of the Legal Practitioners Act? It may be that this may require the whole rules and rulings to be reconsidered].

No.

At the close of the arguments, Teunon J. intimated that in his opinion the vakils had a right to appear in this case and, as under the Charter his opinion as that of the Senior Judge prevailed, their Lordships would hear the original case on the merits. Chaudhuri J. differed.

C. A. V.

The judgments of the Court were as follows:

February, 28.

Teunon, J.—These are six applications made to this Court under the provisions of section 115 of the Civil Procedure Code and of section 195 (6) read with section 195 (7) (c) of the Code of Criminal Procedure.

In each case the applicant was the defendant and the opposite party the plaintiff in a suit brought in the Court of Small Causes, Calcutta. The suit having been dismissed, the defendants applied to the trial Judge for sanction to prosecute the plaintiffs under sections 209 and 193 of the Indian Penal Code. Sanction having been refused, in these applications for the hearing of which I and Chaudhuri J. have been constituted a Divisional Bench by his Lordship the Chief Justice, we are invited to revise and set aside the order of the Judge of the Court of Small Causes and to grant the sanction for which application was, and is, made.

At the hearing Babu Monmatha Nath Mukerjee a vakil enrolled and ordinarily practising in this Court was authorised by the

(1) (1913) I. L. R. 41 Calc. 173; 18 C. L. J. 452.

(2) (1898) 3 C. W. N. 247. (3) (1902) I. L. R. 29 Calc. 498.

(4) (1902) I. L. R. 29 Calc. 239.

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plaintiffs opposite parties to appear and plead on their behalf and the question therefore arose whether in these matters he as a vakil was entitled to be heard. On this question we have heard on the one side the learned Advocate-General on behalf of the Bar, and also learned Counsel appearing on behalf of the Incorporated Law Society, and of the Attorney on the record, and on the other side the learned Government Pleader Mr. Ram Charan Mitter, appearing on behalf of the Vakil Bar. I have now to give my reasons for holding, as differing from my learned colleague I did, that in the matters now before us the vakil claiming the right of audience, was entitled to be heard. As, however, the question is to be determined only incidentally to and for the purposes of the hearing before us, I need not set out my reasons at any great length.

It is not disputed that as the order sought to be set aside is one made by a civil Court, we are sitting as a Divisional Bench in the exercise of the civil and not of the criminal jurisdiction of this Court. That question though there arising in connection with an order under section 476 and not as here an order under section 195 of the Code of Criminal Procedure has been decided by a Full Bench in the case of *Emperor* v. *Har Prasad Das* (1). In this connection I may refer also to the case of *In re Ram Prasad Malla* (2).

The question then in effect is whether we are sitting in a matter appertaining to the ordinary original civil jurisdiction, or, as the learned Advocate-General apparently prefers to put it, to the 'Original Side' of this Court.

Now, the Court of Small Causes, Calcutta is no doubt within, and the local limits of its jurisdiction are co-terminous with, the local limits of our ordinary Original Civil Jurisdiction.

The learned Advocate-General's contention then is that it is the 'Original Side' of this Court that has inherited the jurisdiction formerly exercised by the Supreme Court over the Court of Small Causes (then known as the Court of Requests) and in support of his contention he has relied mainly on article 21 of the Charter establishing the Supreme Court, sections 9 and 13 of the Indian High Courts Act, 1861, clause 12 of the Letters Patent 1865, the decisions of Sale J. in *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (3), in *Ramadhin* v. *Sewbalak* (4) and of Pugh J. on the hitherto prevailing practice of the Court, and on the observations on questions of

(1) (1913) I. L. R. 40 Calc. 477; 17 C. L. J. 245.
(2) (1909) I. L. R. 37 Calc. 13.
(3) (1903) I. L. R. 30 Calc. 986.
(4) (1910) I. L. R. 37 Calc. 714.

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jurisdiction to be found in *Rodricks* v. *Secretary of State for India* (1). He has further made reference to Rule 9 (also Rule 4) of Chapter XXXIV of the Rules and Orders of the High Court (Original Side) 1914, and to the case of *In re Mahomed Ali* (2).

On the other hand Mr. Ram Charan Mitter has relied mainly on section 4 of the Legal Practitioners Act, XVIII of 1879, and the proviso inserted in that section by Act I of 1908; section 6 and the 1st schedule of the Presidency Small Causes Courts Act, XV of 1882, the definition of the term ' High Court' to be found in the Criminal Procedure Code, and in the General Clauses Act X of 1897, on the cases reported in *In re Toolsee Doss Seal* (3); *Haladhar Maiti* v. *Choytonna Maiti* (4) and *Jamna* v. *Sabapathy* (5) and on the observations of Mookerjee J. in his appellate judgment in the present applications (6).

Having carefully considered all the arguments advanced on either side, I am satisfied that the learned Advocate-General's contention cannot be supported. It appears to be based on the erroneous assumption that the Judges appointed by the Chief Justice from time to time to exercise the Ordinary Original Civil jurisdiction constitute in some mysterious way a separate and independent Court. It also appears to confound or fails to distinguish between 'jurisdiction' and the area over or the local limits within which that jurisdiction is exercised.

The rule of Court to which we have been referred (Original Side, Chapter XXXIV rule 4) framed in 1903, no doubt indicates the Judge to whom, in accordance with the order of the Chief Justice, applications, such as the present, must be made but no such rule or order judicially determines or can determine what jurisdiction the Judge entertaining the application will then proceed to exercise.

In *Rodricks* v. *Secretary of State for India* (1) the learned Judges followed an authoritative decision of a Divisional Bench, while the decisions of Sale J. in *Sarat Chandra Singh* v. *Brojo Lal* (7) and Pugh J. in *Ramadhin* v. *Sewbalak* (8) though entitled to great respect, are the decisions of single Judges and appear to be based merely on practice. But practice, and I may perhaps add, prejudice, must give way to law and to the rights conferred by law.

In the present matters, original jurisdiction has been exercised and exhausted by the Court of Small Causes. That Court is no part

(1) (1912) I. L. R. 40 Calc. 308.
(2) (1913) I. L. R. 41 Calc. 466 (473).
(3) (1867) 7 W. R. 228.
(4) (1903) I. L. R. 30 Calc. 588.
(5) (1911) I. L. R. 36 Mad. 138.
(6) (1916) 25 C. L. J. 193 (205).
(7) (1903) I. L. R. 30 Calc. 986.
(8) (1910) I. L. R. 37 Calc. 714.

or branch of this Court but is an inferior or subordinate Court, and in dealing with its judgments or orders this Court, in my view, is a superior Court exercising not original but appellate or revisional jurisdiction. From this and the provisions of section 4 of the Legal Practitioners Act, it follows that in these matters the vakil who has claimed the right of audience is entitled to be heard.

Chaudhuri, J.—I am sorry I am unable to agree with my learned colleague on the preliminary point argued in connection with these applications, namely as to the right of audience claimed by the learned vakil for the opposite party, whose contention is that the vakils of this Court have such right under Rule 4, Chapter II, O. S. read with section 4 of the Legal Practitioners Act, namely to appear and plead in all cases "except before a Judge of the High Court, Division Bench or High Court exercising Original Jurisdiction in a Presidency town." He contends that our rule only restricts their right when the Original Side exercises its Original Jurisdiction. He further contends that if Rule 9, Chapter 34 O. S. corresponding to Appellate Side Rule 5, Chapter II, which provides for the hearing of applications under section 115, Civil Procedure Code by a single Judge on the Original Side, stands in the way of vakils appearing in such applications, it is *ultra vires*. The learned Government Pleader has been heard on behalf of the Vakils and the Advocate-General on behalf of the Bar and the Incorporated Law Society, for the Attorneys of the Court, who contest the right so claimed.

The question has arisen in these circumstances. Six applications were made to me when I was sitting on the Original Side, on behalf of the defendants in the above-mentioned Small Cause Court suits, against an order passed by a learned Judge of the Presidency Small Cause Court refusing sanction to prosecute the plaintiffs. The applications were headed "In the matter of section 115, Civil Procedure Code." I issued a Rule on the plaintiffs to show cause why that order shold not be set aside. They appeared by counsel, and I held that the learned Judge had wrongly declined jurisdiction, having erred in holding that an application for leave to sue in the Small Cause Court was not a stage in a judicial proceeding. I also held he had erred in refusing the applications on the ground of delay. I held that the delay had been satisfactorily accounted for. As he had not dealt with the merits of the applications, but had thrown them out on preliminary points, I remanded them, directing an enquiry on the materials which had been placed before him. In the course of argument

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it was suggested that the applications before me did not come under section 115, Civil Procedure Code. I held it was unnecessary to consider the question as it was practically conceded by learned counsel for the plaintiffs (opposite party) that the Court over which I then presided, as the superior Court of the Presidency Small Cause Court, had power to deal with the applications under section 195, Criminal Procedure Code. I said that, if necessary, the heading of the applications would be amended.

The plaintiffs appealed against my judgment under section 15 of the Letters Patent, to the Bench hearing appeals from the Original Side. That Bench consisted of the Chief Justice and Mookerjee J. They held that I was right on both the points decided by me, but were of opinion that my order of remand was wrong, and the learned Chief Justice "remitted" the applications to Teunon J. and myself as a Special Bench for disposal on their merits. The order does not specify the jurisdictions in which we are sitting as a Special Bench. Clearly the appellate bench as such, had no jurisdiction to remand the applications to any other Bench of this Court, than to the Court on the Original Side. It is also to be noticed that the Original Side is in no sense a Court subordinate to the Appellate Bench of the same Court which hears appeals therefrom, and an application by way of appeal to it under section 195, Criminal Procedure Code, does not appear to me to be competent: *Than Pe* v. *Ba Than See* (1). The Appellate Bench however dealt with the matter under section 15 of the Letters Patent. Whatever my views may be about the power of the superior Court to remand when the subordinate Court declines jurisdiction on a preliminary point and does not deal with the merits of a matter, especially in cases like these, when the superior Court by dealing with them may deprive the opposite party of the right of appeal, we are bound to deal with these applications as having been rightly remitted to us as a Bench specially constituted by the learned Chief Justice although it strikes me that if I had no power to remand to the Small Cause Court under section 195, Criminal Procedure Code, the Appellate Court similarly had no such power. This Bench has been constituted by him, not as a member of the Court of appeal, but by virtue of his statutory power as Chief Justice under section 14 of the High Courts Act (24 and 25 Vict. C. 104). As I have pointed out he has not mentioned the jurisdiction. He has "remitted" the applications to us, which to my mind implies that he has sent them back to the Court

(1) (1911) 4 Bur. L. J. 206; 12 Cr. L. J. 469.

where they were originally made, namely to the Original Side. It has been argued that as Mookerjee J. has held that section 195, Criminal Procedure Code, creates a "special jurisdiction" these applications must be taken as made to us not in the exercise of the original jurisdiction of this Court. This seems to me to be based upon a confusion as to the meaning to be attached to the word "jurisdiction." The learned Judge says "The true view is that section 195 creates a special jurisdiction, as explained in *Audimulam* v. *Krihnayen* (1)." Reference to that case shows that the learned Judges do not use the expression "Jurisdiction," and if I may say so with respect, correctly use the words "special power." They held that the power conferred by section 195 (6), Criminal Procedure Code, was not a part of the Appellate and Revisional jurisdiction of the Court under Chapters 31 and 32, Criminal Procepure Code, but that it was a special power.

One of the questions before us appears to be whether seciton 195, Criminal Procedure Code, cuts down the power which the High Court has under section 115, Civil Procedure Code, or its power of superintendence under clause 15 of the High Courts Act. I understood my learned colleague to agree with me that our revisional powers have not been so cut down. Argument at the bar proceeded upon the same basis: Section 195 (6) and (7) seem to me to deal with a special case of revision. The power is in the High Court, it has not been newly created. It is covered by clause 15, and section 115, Civil Procedure Code and section 195 (6), Criminal Procedure Code, are specific instances where we can exercise our revisional powers. It does not seem to me that a new power has been conferred upon us by section 195 (6), nor has it created a special jurisdiction. The dependent question is, Are we sitting on the original side. Are we hearing these applications as the principal Court of original jurisdiction situate in Calcutta? That we undoubtedly are. At the conclusion of the argument my learned colleague was of opinion that the vakils had the right to appear in such applications, and claimed that under clause 36 of the Letters Patent (1865) his opinion as that of the Senior Judge of this Bench, should prevail. Although I was not quite prepared to accede to it, I had no desire to discuss the matter, as it seemed doubtful to me at the time, if the difference between us could be referred to a third Judge, or a Full Bench of this Court. I thought that time and trouble would be saved by my hearing the learned vakil for the opposite party on the merits of the applications and

(1) (1912) 22 Mad. L. J. 419.

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I accordingly heard him, specially as it is always a pleasure to hear him, and also because it was clear to me that an instance of this nature could not be looked upon as establishing a precedent against other decisions of this Court. It strikes me that a question relating to the rival claims of different sections of legal practitioners of this Court involving rules framed by the Full Court cannot be determined in this way. Such questions are not settled by the opinion of a single Judge or of a Division Bench of this Court. I venture to think that discussions which tend to disturb the well-established practice of this Court, or create a feeling of uncertainty about it should not be encouraged. Such discussions sometimes cause irritation between different branches of the profession which is always unfortunate. Applications under section 195, Criminal Procedure Code, are so rare that the right if conceded is not likely to be of much practical value. I did not therefore think it right to dissent from my learned colleague and bring matters to a deadlock for the time being. We then heard the learned vakil. I think it unnecessary in the circumstances to give reasons for my views in detail. Having, however, been associated with the Original Side of this Court for over thirty years as Advocate and Judge and claiming knowledge of the practice of the Court, I think it may be useful to record my view that the statement made by Pugh J. in *Ramadhin Bania* v. *Sewbalak Singh* (1) about the practice of this Court in respect of applications under section 622, now section 115, Civil Procedure Code, in matters arising out of proceedings in the Presidency Small Cause Court, is entirely correct. He says "there has been a well-established practice for at least 50 years that these applications under section 622 should be made on the Original Side of this Court, and it was considered settled that these applications should be made on the original side by Counsel." Sale J. said the same thing in *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (2). "It is a remarkable fact that the jurisdiction of a Judge sitting on the Original Side to exercise revisional powers over the Presidency Small Cause Court, which is now challenged for the first time, has been exercised ever since the establishment of the High Court, over 40 years ago, as its records abundantly show. Within this period innumerable applications have been heard and determined by single Judges sitting on the original side of this Court." I am aware that in *Haladhar Maiti* v. *Choytonna Maiti* (3) Maclean C. J. said "applications have invariably been made to the Chief Justice, who

(1) (1910) I. L. R. 37 Calc. 714. (2) (1903) I. L. R. 30 Calc. 986.
(3) (1903) I. L. R. 30 Calc. 588.

can appoint, and who does then and there appoint, himself and the Judge who may be sitting with him to be the Bench to hear the application." The learned Chief Justice appears to have been misled into making such a statement. It should be remembered that both Sale and Pugh JJ. were for many years practising members of the Calcutta Bar before they became Judges of the Court. The uniform practice of this Court was sought to be varied for the first time in 1901. Pugh J. correctly says "For some short time prior to 1902, similar applications were successfully made on the Appellate Side by Vakils. This, however, was put an end to by a decision of Rampini and Pratt JJ. in *Shamsher Mundul* v. *Ganendra Narain Mitter* (1) who held that the Bench taking the Presidency Group had no jurisdiction in Calcutta, and therefore no jurisdiction over the Calcutta Small Cause Court. This question turned on the order of the Chief Justice allocating business to the various Benches, and while this order gave the Presidency Group jurisdiction over cases from the 24-Perganahs—the 24-Pergannahs is not Calcutta. However another application was made by a vakil in the case of *Haladhar Maiti* v. *Choytonna Maiti* (2) to the Chief Justice Sir Francis Maclean and Mr. Justice Mitra. A preliminary objection was taken based on the last case, but it was overruled on the ground that the learned Judges were not dealing with the matter as the Judges taking the Presidency Group, but as a Bench constituted by the Chief Justice to deal with the case, and there could be no question but that the Chief Justice had the power to constitute such a Bench and deal with the application." This correctly states the facts. As against the prevailing practice, the following cases only, of applications made to Appellate Divisional Benches of this Court, by vakils have been referred to by the learned Government Pleader (I) *the Petition of Toolsee Doss Seal, a Vakil of this Court* (3) dated 28th February, 1867, (II) *Ananta Coomari Dassi* v. *Radharani Dassi* (4) (III), *Jadu Mani Boistabee* v. *Ram Kumar Chakravarti* (5), (IV) *Shamsher Mundul* v. *Ganendra Narain Mitter* (1) and (V) *Haladhar Maiti* v. *Choytonna Maiti* (2). It will be noticed that between 1867 and 1901 not a single case can be found in our Law Reports to show that such applications were made by vakils on the Appellate Side of this Court. In the case in *Ananta Coomari* v. *Radharani* (4), the learned Judges referred to the case of *Purson Chund Golacha* v. *Kajooram* (6), which was an

(1) (1902) I. L. R. 29 Calc. 498.
(2) (1903) I. L. R. 30 Calc. 588.
(3) 1867) 7 W. R. 228,
(4) (1901) 3 C. L. J. 199.
(5) (1902) I. L. R. 29 Calc. 239.
(6) (1872) 10 B. L. R. 355.

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application on the Original Side of the Court. The Judges in the case of *Jadu Mani* v. *Ram Kumar* (1), were Rampini and Pratt, JJ. The same Judges held in *Shamsher* v. *Ganendra* (2), that the Bench taking the cases of the Presidency Group had no jurisdiction over the Court of Small Causes at Calcutta. The statement of the Chief Justice in *Haladhar Maiti* v. *Choytonna Maiti* (3) as to the practice is not correct, as I have already pointed out. The case of *The Petition of Toolsee Doss Seal* (4) related to an application made by a vakil of this Court that he had a right to be heard in the Presidency Small Cause Court, where he had been refused audience. This Court did not issue a Rule on the Presidency Small Cause Court as the learned vakil's client had succeeded in the suit in that Court. That case therefore gives us no help, and the other cases, between 1901 and 1903 above referred to only show the attempt which was made during that period to unsettle the established practice of this Court. The matter was eventually set at rest in 1903 by rule 9 chap. 34 Original Side which confirmed the prevailing practice. The Index Book of the Original Side of this Court relating to such applications shows that hundreds of these applications have been made on that Side since 1883. In the earlier Index Book all miscellaneous matters have been mixed up and it is difficult to separate the applications in revision. I may state that such applications are almost daily made on the Original Side on motion days.

It is well-established in this Court after the Full Bench ruling in *Emperor* v. *Har Prasad Das* (5), that section 439 of the Criminal Procedure Code has no application to an order passed under section 476, Criminal Procedure Code, but the High Court can exercise the powers vested in it by section 115 of the Civil Procedure Code or section 15 of the High Courts Act, and that the criminal Bench as such has no jurisdiction to deal with the matter on revision. The ruling in *Salig Ram* v. *Ramji Lal* (6) is that the High Court has no jurisdiction, in the exercise of its revisional powers on the criminal Side, to interfere with orders relating to sanction under section 195, Criminal Procedure Code. The same view had been accepted by this Court. Although we two now constitute the criminal Bench of this Court, these applications have not come up before us in our criminal jurisdiction. The civil appellate Division Benches of this Court which deal with particular provincial Courts,

(1) (1902) I. L. R. 29 Calc. 239.
(2) (1902) I. L. R. 29 Calc. 498.
(3) (1903) I. L. R. 30 Calc. 588.
(4) (1867) 7 W. R. 228.
(5) (1913) I. L. R. 40 Calc. 477.
(6) (1906) I. L. R. 28 All. 554.

or Groups of such Courts, have no jurisdiction as such, over the Presidency Small Cause Court. The local jurisdiction of the Presidency Small Court coincides with that of the Original Side of this Court (section 17 Act XV of 1882). The law administered by that Court has to be dealt with it and determined according to the law for the time being administered by the Original Side of our Court (section 16 Act XV of 1882). The Presidency Small Cause Court is subordinate to the High Court. The Original Side is a Court within the meaning of the Civil Procedure Code and is a portion of the High Court. Without any more it would be natural and logical to hold that the Presidency Small Cause Court is subordinate to the Original Side of the High Court.

The question historically looked at leads to the same conclusion. The present Presidency Small Cause Court has taken the place of the Court of Requests, which was placed under the order and control of the Supreme Court by the Charter of Justice and Proclamations in the same manner as the inferior Courts in England were then subject to the order and control of the Court of Queen's Bench—see section 21 of the Charter of the Supreme Court (14 Geo. iii 1774). In the Proclamation of the Governor-General-in-Council dated 18th March 1802, declaring the jurisdiction powers and practice of the Court of Commissioners for the recovery of small debts, it was provided that the said Court and its proceedings were subject to the control of His Majesty's Supreme Court in as full and ample a manner, to all intents and purposes as the former Court of Requests: see the Proclamation in Sm. and Ryan's Rules and Orders Vol. ii App. xvi. Act IX of 1850 constituted the Presidency Small Cause Court, the Judges of the Supreme Court *virtute officii*, as such Judges exercised control over that Court. The Supreme Court possessed no appellate jurisdiction, but had local jurisdiction, the same as the Original Side of this Court now has. By the High Courts Act (24 and 25 Vict. C. 104), Her Majesty was empowered to erect a High Court at Fort William in Bengal. It was provided that upon the establishment of such High Court, the Supreme Court and Sudder Dewany and Sudder Nizamut Courts should be abolished. Section 9 enacted as follows :—"Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct subject,

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however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby, and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts." In 1862 the Letters Patent were granted. By these the High Court was vested with civil and criminal jurisdiction, both original and appellate. By the Letters Patent of the 28th December, 1865, the earlier Letters Patent of 1862 were revoked. Thus then the High Court inherited all jurisdiction and every power in any manner vested in the supreme Court and the Sudder Dewany and Sudder Nizamut Courts. This High Court was thus the successor of the Supreme Court with territorial jurisdiction confined to the Presidency town of Calcutta and as the Supreme Court was not a Court which had power of superintendence over the Mofussil Courts, the original side did not and does not possess such power, and similarly as the Appellate Side dealing with appeals from Provincial Courts has no jurisdiction over the Presidency Small Cause Court, the power of superintendence over it, which the Supreme Court had, remained in the Original Side of the High Court. There are some large powers which still remain in the Original Side of the High Court as the successor of the Supreme Court, which do not belong to the Appellate Side of the Court, although it is correct to say that they belong to the High Court, taking the two sides collectively. Take the jurisdiction of the High Court in matters of contempt. The question was elaborately discussed in the matter of *Amrita Bazar Patrika* (1) where it was held by Sir Lawrence Jenkins C. J. that in case of interference with the due administration of justice by a Division Bench of this Court in relation to a criminal appeal pending before it, if such interfence amounted to an offence under the Common Law, this Court has power to deal with it on its crown side, that is to say, in its original criminal jurisdiction, that power having been inherited by it from the Supreme Court.

It is unnecessary to multiply instances as to the special powers inherited by the High Court from the Supreme Court, which are

(1) (1913) 17 C. W. N. 1253; 18 C. L. J. 452; I. L. R. 41 Calc. 173.

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exercised on its original side. Historically therefore the power of superintendence, direction and control which was possessed by the Supreme Court over the Presidency Small Cause Court, appertains to the Original Side of this Court. It seems clear to me that all such powers when exercised by the original side are exercised in its Original jurisdiction within the meaning of section 4 of the Legal Practitioner's Act. It is not, as was suggested during argument, an exercise of its Extraordinary Original Jurisdiction which is defined by clause 13 of the Letters Patent (1865). The Original Side has of course no appellate jurisdiction and the appellate jurisdiction of the Divisional Benches of this Court is not available in respect of proceedings in connection with the Presidency Small Cause Court. Broadly speaking, the revisional power which is invoked in respect of such proceedings appertains, as I have tried to show, to the Original Side, logically, historically and as a matter of practice. It has not been doubted that High Court in its Original Side has power to issue a writ of *certiorari*, which is a writ to an inferior Court to call up the records of a cause therein depending, that conscionable justice may be therein administered, In 1884 an application was made to Pigot J. who was then sitting on the Original Side of this Court for such a writ to bring up certain proceedings relating to an assessment before the Commissioner of the Calcutta Corporation. He granted the Rule, but eventually discharged it on its merits. The appeal from it was entertained as an appeal from original civil jurisdiction [see *Nundo Lal Bose* v. *The Corporation* (1)]. Garth C. J. held—"The authority of this Court to remove the proceedings of inferior Courts in the exercise of their judicial functions, is undoubted. It is an authority derived from the Old Supreme Court, and is similar to that which was exercised by the Court of Queen's Bench in England, and, if the Commissioners in this case were exceeding their jurisdiction in making the assessment, it seems clear that we have the power to quash it upon *certiorari*, notwithstanding the provision in section 17 in the Calcutta Municipal Consolidation Act, 1876," but as it appeared that the commissioner had acted within their powers the appeal was dismissed. Wilson J. took the same view. The right of a single Judge sitting on the original side of this Court to issue such a writ was not questioned in that case, although eminent counsel appeared and contested that matter. Such a power is in its nature revisional. It is conceded that applications under section 115, Civil Procedure Code, in respect of the Presidency Small

(1) (1885) I. L. R. 11 Calc. 275.

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Cause Court appertain to the original side, under our rules. It seems to me necessarily to follow that the ordinary incidents of the procedure of that Court attach to such applications, clause (21) of the Supreme Court Charter has no doubt been repealed by section 2 of the present Presidency Small Cause Court Act (XV of 1882) and the power of superintendence is now given by section 6 of that Act. To my mind it makes no difference as the Appellate Divisional Benches of this Court as such have no power of superintendence over the Presidency Small Cause Court in the same way as the original Court has no jurisdiction over the Provincial Small Cause Court. Act XI of 1865 consolidated and amended the law relating to the Courts of Small Causes established beyond the local limits of the Ordinary Original Civil Jurisdiction of the High Court of Judicature. Section 4 of that Act provides that these Courts are subject to the general control and order of the High Court which is defined in section 1 as the highest civil Court of appeal, which is practically the same definition as we find in the General Clauses Acts of 1868 and 1897. Act IX of 1887 has taken the place of Act I of 1865 which also excludes the Ordinary Original Civil Jurisdiction of this Court. Section 25 gives revisional jurisdiction to the High Court which is exercised by our appellate Division Benches and section 28 gives administrative control and superintendence to the High Court, in the same way as section 6 of the Presidency Small Cause Court Act gives it to the High Court. The Presidency and the Provincial Small Cause Courts have been deliberately kept separate. The law, the practice and procedure in each of them are different. Reference from the former are heard by that Bench of our Court which deals with appeals from the Original Side, and those from the latter by the Appellate Division Benches. To hold that the Revisional Jurisdiction of this Court over the Presidency Small Cause Court cannot be exercised except by a Special Bench constituted for the purpose in my opinion unnecessarily multiplies the machinery by which the powers of this Court are exercised. Section 13 of the High Courts Act gives power to the High Court to make its own rules for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges of the Court, of the original and appellate jurisdictions vested in the Court, in such manner as may appear to the Court to be convenient for the due administration of justice. Section 14 gives the Chief Justice the authority to determine what Judges shall sit alone or in Division Courts. Why in rare applications relating to sanctions of the

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character now before us, the ordinary Benches of our Court should not be held sufficient I candidly confess I fail to understand. It seems to me unnecessary to disturb the established practice of this Court for such application. Even as late as 1913, such an application as is now before us, was made to Chitty J. exercising Original Jurisdiction. See *In the matter of section 115 Civil Procedure Code and 15 of the Charter and in the matter of sanction to prosecute Awood Narain Pandey and three others* (1). Although I have stated some of the grounds for my decision, in the view that our respective judgments in a matter of this nature are not likely to have any binding effect I refrain from elaborating them. I think, however, I ought to point out that the practice as to applications by way of appeal under section 195, so far as Madras was concerned was changed in 1902 after the decision of that eminent Judge Sir Bhashyam Iyenger *In Re Chennanagoud* (2). In Madras they have since been dealt with under section 622 now section 115, Civil Procedure Code, and the present practice there has been looked upon as its settled practice for the last 14 years. Since 1902 also the Allahabad Court changed its views—see the judgment of Burkitt J. in *Emperor* v. *Md. Khan* (3) and *in the matter of the Petition of Bhup Kumar* (4). The observation of Banerjee J. in the case last cited is worthy of notes, namely that the Court should be loath to depart from the established practice unless convinced that it has not the sanction of law and is grossly erroneous. The practice of the Court forms the law of the Court. The Original Side has, as I have shown, always exercised revisional powers over the Presidency Small Cause Court under section 115, Civil Procedure Code, and 15 of the Letters Patent. Why it should not exercise similar power in respect of proceedings under section 195 of the Criminal Procedure Code I do not understand. In *Ex parte James Bell Cox* (5) Lord Esher said that when a Judge had thought it necessary for the purpose of a case to make a deliberate examination of the practice of his work and to state such practice such statement was entitled to great weight. In connection with the question of practice now before us we have at least two learned Judges of this Court who made such an examination. In *Attorney General* v. *Marquess of Ailesbury* (6), Lord Halsbury L. C. said a Judge was

(1) (1913) Unreported. Decided on the 15th December.

(2) (1902) I. L. R. 26 Mad. 139.

(3) (1902) All. W. N. 202.

(4) (1904) I. L. R. 26 All. 249.

(5) (1887) 20 Q. B. D. 1.

(6) (1887) 57 L. J. N. S. Q. B. 83; 12 App. Cas. 672.

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not at liberty to assume against a well-established practice of the Court followed by eminent Judges that the Court or they were in error as to their powers and jurisdiction. In *Liverpool and Manchester Ærated Bread Co.* v. *Firth* (1) Stirling J. said that it was much better to adhere to what had been the practice than that a single Judge should attempt to set up what he considers as better practice. In this case there is no question of any fundamental principles of justice being in danger and it seems to me that no case has been made out for making a departure, for introducing a novelty for the sake of novelty. I hold that we are now sitting on the original side of the Court, exercising such jurisdiction as is ordinarily exercised on that side.

The division of work in the Madras High Court is entirely different from that of our Court. The appellate work of the Madras Court is assigned to Benches constituted for the disposal of particular classes of work and not according to groups of districts. Applications under section 195, Criminal Procedure Code, are treated there as Civil Miscellaneous Appeals or as Appeals from Orders, and recently so far as I have been able to ascertain the Madras High Court has assigned all cases under section 195, Criminal Procedure Code, whether on the criminal or civil Side, to the Judges doing the criminal work of the Court, who also deal with a Civil Miscellaneous List. In Madras vakils have the right to appear on the original side and therefore the practice of that Court or its rulings with reference thereto do not give us any help and I need not therefore discuss them.

The following judgments were then delivered on the merits of the case :

Teunon, J.—In these six matters it appears that two plaintiffs Budhu Lal and Raghunath Lall brought respectively 7 suits and 22 suits against different defendants in the Presidency Small Cause Court. The defendants being resident beyond the jurisdiction, in each case the plaintiff applied for leave to sue, and in support of his application swore that the money for the recovery of which the suit was brought had been lent in Calcutta.

On the 23rd of March 1914, all the 29 suits were dismissed, in each case on the special oath of the defendant.

Thereafter on the 21st December 1914, in each case application was made on behalf of the defendant for a sanction to prosecute the plaintiff under section 209 of the Indian Penal Code in respect of the claim and under section 193 in respect of the statement made

(1) (1891) L. J. 60 Ch. 153; (1891) 1 Ch. 367.

in the application for leave to sue. Of the 29 applications, only the 6 now before us were proceeded with and these were eventually dismissed by the Judge of the Court of Small Causes on the 14th of June, 1915. The dismissal was on two grounds, namely that an application for leave to sue is not a stage of a judicial proceeding and that there had been undue delay in making the application for sanction.

Against the orders refusing sanction, applications were then made to this Court under section 115 of the Civil Procedure Code and section 195 (6) read with section 195 (7) (*c*) of the Code of Criminal Procedure. These applications were made to Chaudhuri J, then sitting in the exercise of the Original Jurisdiction of this Court, and at the hearing of the rules then issued that learned Judge directed that the Judge of the Small Cause Court should make further inquiry and thereafter dispose of the applications.

Against his orders appeals were preferred and the appellate Court has held that under the provisions of section 195 (6) the superior Court though competent to act upon evidence taken before itself or taken by the subordinate Court under its direction is not competent to make a remand to the subordinate Court for further inquiry and decision.

The orders of Chaudhuri J. were accordingly set aside and the applications remitted for rehearing and his Lordship the Chief Justice has constituted us a Divisional Bench for the purposes of this rehearing.

When the application came on for hearing a question arose whether Babu Monmathanath Mukerjee through whom the plaintiffs opposite parties desired to be heard was entitled as a vakil to appear and plead on behalf of his clients. In accordance with the opinion of the Senior Judge on this question we have heard Babu Monmatha Nath Mukerjee and now proceed to determine the question whether with or without further inquiry sanction should be given to the several applicants for the prosecution of the plaintiffs opposite parties.

It is not now contended that an application for leave to sue is not a stage in a judicial proceeding and in view of the opinions expressed by Chaudhuri J., and by the appellate Court the learned vakil appearing for the opposite parties has wisely refrained from contending further that the delay has not been sufficiently explained.

The further materials before us in each case are an affidavit by the applicant defendant and an affidavit by the plaintiff. No doubt the verification by the defendant's application is faulty but he does

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therein swear that the suit brought against him is wholly false and that he had never been in Calcutta prior to its institution. Having considered this affidavit, having regard also to the decision in all six suits, and to the fact that even now though the plaintiff says he has independent evidence, there is no affidavit in support of his own, we think that it is unnecessary to take further evidence at this stage and that a case for the grant of sanction has been made out. In each case we therefore set aside the order of the Small Cause Court and grant to the petitioner sanction to prosecute the plaintiff opposite party under section 209 of the Indian Penal Code in respect of his claim, and under section 193, Indian Penal Code, in respect of the statement made and in support of the plaintiffs' application for leave to sue, namely the statement that the principal money claimed was lent in Calcutta.

Chaudhuri, J.—I agree that sanction should be granted to prosecute the plaintiffs as aplpied for; I have nothing to add to the judgment delivered by my learned colleague.

A. T. M. *Order of the Small Cause Court Judge set aside: Sanction granted.*

PRIVY COUNCIL.

PRESENT: *Lord Dunedin, Lord Moulton, Sir John Edge and Mr. Ameer Ali.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

MAHARAJA RADHA KISHORE MANIKYA BAHADUR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

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March, 23, 24, 25, 26.

Waste-Lands Act, 1863, (Act XXIII of 1863), S. 18—The Act applies to all lands—Burden of proof on those who plead it—Land sold under it—False description in notice under it, effect of—Suit to recover land three years after the sale thereof under the Act—Survey maps as evidence of title, value of.

Waste-lands Act, applies to all lands whether held by the Government or other people.

The Waste-lands Act, is drastic in its character, and makes a great invasion on private rights, and consequently those pleading it must bring the matter strictly within its provisions.

Where a plot was sold by the Government acting under the Waste-lands Act, as waste land, and the notice issued under the Act advertised the sale of the plot in a certain pergunnah whereas it was not in that pergunnah; and the plaintiff after more than three years after the land had been delivered by the Government to the purchaser, brought the suit in the ordinary civil Court against the Government to recover possession of the plot:

Held, that inasmuch as the said notice was misleading, the whole of the proceedings as against the plaintiff failed for want of proper basis; that section 18 of the Act was clearly applicable to the proceedings before the special Court and that Court alone as constituted under the Act, and the plaintiff's suit was not barred by that section.

Their Lordships have always given great weight to the accuracy of the survey maps, which are, however, not conclusive; but in the absence of evidence to the contrary they will be presumed to be conclusive.

Appeal from a decree of the High Court at Calcutta (May 2, 1908), affirming a decree of the Court of the Subordinate Judge of Sylhet (April 15, 1905).

The suit in which those decrees were passed was brought on September 21, 1898, by the Maharajah of Tipperah to recover possession of 5 plots of land numbered consecutively 1, 2, 3, 4, and 5 against the Government and its lessees, certain tea companies. The plaintiff pleaded that the plots were either part of a permanently settled *taluk* now belonging to him, or that he had acquired a title thereto by 60 years adverse possession against the Government.

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The Subordinate Judge held that all the plots were situate within the ambit of the permanently settled taluk now belonging to the plaintiff, who as such owner was entitled to recover possession thereof, and that the plaintiff had been in possession for more than 60 years and also within 12 years of suit of all plots except plot No. 1 of which respondent No. 2 in Appeal No. 4 of 1912 had taken possession in 1880. He therefore decided that the suit in respect of plot No. 1 was barred by limitation. He also held that respondents 3 and 4 in appeal No. 4 of 1912 took their leases of plots 3 and 5 from the Government in the *bona fide* belief in the title of the Government, and that they should not therefore be ejected from those plots, but should pay rent to the plaintiff. A decree was accordingly made dismissing the suit as to plot No. 1 and awarding the plaintiff possession of plots 2 and 4 unconditionally, and plots 3 and 5 subject to the above-mentioned condition: The Subordinate Judge also over-ruled the contention that the suit in respect of plot No. 5 was barred under the Waste Lands Act.

The Government appealed to the High Court making the plaintiffs and its own co-defendants, the tea companies, respondents. The High Court came to the conclusion that all the plots except No. 5 were not situate within the ambit of his permanently settled taluk, but that the plaintiff had established a title to all the five plots by adverse possession for a period of over 60 years. The findings of the subordinate Judge as to limitation were affirmed. The plaintiffs had filed against the tea companies cross-objections under section 561 of the Code of Civil Procedure 1882, but the High Court refused to consider them as they were filed by one respondent against the other respondents, who had not been served with a notice of the cross-objections. In the result the High Court affirmed the decree of the Subordinate Judge. On the contention that the suit relating to plot No. 5 was barred by the Waste-Lands Act, the High Court observed:

"If it were necessary to decide the point in this case, we should not be prepared to hold that the Act applies to Govenment land alone."

The Government thereupon appealed to His Majesty in Council. The plaintiff also appealed making all the defendants respondents. But the plaintiff's appeal, which was numbered 4 of 1912, was settled on terms with the tea companies.

Sir Erle Richards, K. C., and *A. M. Dunne* for the Appellant in 126 of 1911 and the respondent in 4 of 1912, contended that the plaintiff-respondent had not established that plots 1, 2, 3 and 4

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formed any portion of his permanently settled estates. He had not proved possession, adverse or otherwise for a period of 60 years prior to the defendants' admitted possession of those plots, and had not established any right or title thereto by such possession or otherwise, and his claim to those plots was barred by limitation—Reference was made to the limitation Act, 1877, section 25, and Sch. II., Arts. 144 and 149. Even if he had possession for 60 years, it was not adverse to the Government, his claim to plot 3 was barred by the 12 years rule of limitation. Reference was made to *Radhamoni* v. *Collector of Khulna* (1); *Mohini Mohun* v. *Promada* (2); *Wali Ahmed* v. *Tota Meah* (3); and *Trustees Exors and Agency Co.* v. *Short* (4). As to the value of survey maps as evidence of title and possession at time of the survey *Nobo Coomar* v. *Gobind Chunder* (5) was cited. It was also contended that the suit was barred by the Waste Lands Act and *Kristo Chundra Dass* v. *Steel* (6) was referred to. That Act did not only apply to land belonging to Government. Notification under section 8 of the Act excluded the jurisdiction of the ordinary Courts. The suit was also barred by the notification made under the Indian Forests Act (VII of 1878)

De Gruyther, *K. C.*, and *J. M. Parikh*, for the Plaintiff. Respondent, in appeal 126 of 1911 and the Appellant in appeal 4 of 1912, contended that the plaintiff had established his title to the lands in suit as forming portions of his permanently settled estates. There were concurrent decisions of fact that plot 5 was situate within the ambit of those estates. He had also established a title to the whole of the lands in dispute by adverse possession and both Courts below had concurred in finding that he had been in undisturbed possession since early in the 19th century. This suit was not barred by limitation and the finding against the plaintiff in regard to plot 1. was erroneous. The plaintiff was entitled to a decree giving him unconditional possession of plots 2 and 4 held by the Amu and Rima Tea Estates and the High Court had wrongly refused him relief in the cross-appeal filed in the High Court. The suit was not barred by the provision of Act XXIII of 1863, or Act VII of 1878, or of the Sylhet Jhum Regulation III of 1891. Reference was made to *Lelanund Singh* v.

(1) (1900) I. L. R. 27 Calc. 943; L. R. 27 I. A. 136.
(2) (1896) I. L. R. 24 Calc. 256 (257).
(3) (1903) I. L. R. 31 Calc. 397 (405).
(4) (1888) L. R. 13 A. C. 793.
(5) (1881) 9 C. L. R. 305.
(6) (1885) I. L. R. 12 Calc. 279.

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Government of Bengal (1); Baden Powell's Land Revenue Manual 167; Imperial Gazetteer of India, Vol. 23, Ed., 1908 pp. 195-199; Bengal Regulations of 1869 preamble and sections 1 and 3; Regulation IX of 1825, sections 1 and 2; Waste lands Act sections 1 to 8 and section 18. Proclamation has to be made from the date of which the jurisdiction of the ordinary Courts was excluded, there has not been one—a proclamation cannot be presumed nor can any date be assumed for it. The Government have not produced the proclamation or given the date of it.

E. U. Eddis for Tea Companies, Respondents 3 and 4.

Sir H. Erle Richards K. C., in reply—section 7 of the Waste lands Act imposed a specific obligation on the local Government to issue a proclamation, and it must be presumed that the local Government has done it as it was their duty to do it. The fact of the jurisdiction being taken away.

[*Lord Dunedin*: You did not plead that point, did you ?]

There was an issue about it, issue 5 and a decision on it by the Subordinate Judge. The High Court did not think it necessary to decide it. The Maps and Surveys have not been challenged before, the plaintiff, it was submitted, was bound by them and by the boundaries laid down in them.

The Judgment of their Lordships was delivered by

August, 1.

Lord Dunedin :—The present suit was instituted by the Maharajah of Tippera to regain possession of certain plots of land in Southern Sylhet. The defendants are the Secretary of State for India and certain Tea Companies, who in virtue of leases granted by the Government are at present in possession of the lands in dispute.

There were several plots in controversy, but the judgment of the Court below has been so far acquiesced in that the only ones still in controversy before this Board were those known as plots 2, 3, and 4.

The Maharajah of Tippera is an independent chief whose territory borders upon and adjoins the district of Sylhet. The configuration of the country is that there are several parallel ranges or spurs of hills going northward from the higher ground of independent Tippera, and forming valleys between the spurs. Originally the Rajahs of Tippera claimed that all the hill country to the end of the spurs was independent territory. Owing to this claim, Lieutenant Fisher was sent by the Government in 1821 to survey the ground and delimit the boundary. The outcome of his proceedings is preserved

(1) (1855) 6 M. I. A. 101 (114); 4 W. R. P. C. 77.

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in a map and report. On the map he drew a line from west to east, which excluded from Tippera and incorporated in Bengal the spurs in question. His survey was so far as some parts of this line and the country adjoining admittedly incomplete, as the country was wild and covered by jungle; and difficulties were created by the opposition of hill men known as Kukis, who acknowledged the supremacy of the Raja of Tippera. This claim to an extension of independent Tippera seems to have been more or less persisted in by the Maharajah and his successors till 1861, when Mr. Reynolds, of the Survey Office, was sent to finally delineate on the ground the boundary line which Fisher had only drawn on the map. Since 1861 the line thus laid down has been acknowledged as authoritatively settling the boundary.

The plots of ground in question are all situated to the north of this boundary line, and are therefore admittedly no part of the independent territory.

The position of the lands may be generally described as being in the southern portion of the land lying to the east of the westmost of the spurs of hills before mentioned. The land to the west of the said spur is known as the Pergunnah Bijura, while the land to the east of the same spur is known as the Pergunnah Taraf, in the southern portion of which lies the Tuppa Bishgaon. The Tuppa is sometimes also itself called a Pergunnah. These names existed at the time of Lord Cornwallis's settlement in 1793, and are to be found so marked in Fisher's map in 1821.

The plaintiff is admittedly owner of two Taluks in Tuppa Bishgaon. He acquired them from persons who had brought them at a Government sale in 1799. It is common ground that these were and are settled lands.

The plaintiff accordingly framed his claims alternatively, and pleaded that the plots in question were either part of the settled taluks of Tuppa Bishgaon or otherwise that he had had 60 years' adverse possession of them.

The defence, on behalf of the Secretary of State, alleged that the plots in question were parts of a certain mahal of Halabadi lands in the Pergunnah Bijura.

The learned Subordinate Judge after receiving a report from a Commissioner to whom he remitted the task of examining the lands and comparing them with the various maps, and after considering evidence, oral and documentary, found that the said lands were parts of the settled lands of Tuppa Bishgaon. On appeal the Secretary of State altered his line of argument. It had become apparent

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in the progress of the case that it was impossible to assert with success that the plots were within Pergunnah Bijura, and that consequently it was very difficult, if not impossible, to assert that they were part of the Halabadi lands which undoubtedly were situate in Pergunnah Bijura. He therefore pinned himself to the negative attitude that at any rate they were not shown to be part of Tuppa Bishgaon. To this negative attitude the Court of Appeal agreed, but they held that none the less the plaintiff had shown that the plots had been in the possession of the Rajahs for a period of upwards of 60 years, and that that possession had been adverse to all other claimants. Both Courts held that the dispossession complained of had happened within the period of 12 years before suit, so that the Act of Limitation did not apply. In the result therefore they dismissed the Appeal.

Their Lordships do not propose to examine in detail the evidence which is very voluminous; they will however set forth a few of the salient points which they consider have been established.

1. Pergunnah Taraf was not originally in the district of Sylhet, but in the district of Dacca. That district, unlike the district of Sylhet, was settled without survey. It is accordingly noticeable that while Pergunnah Bijura undoubtedly contains Ilam and Halabadi lands, Pergunnah Taraf does not seem to contain any such.

2. Pergunnah Bijura is undoubtedly to the west of the ridge of hills now called the Raghunandan Hills.

3. Until such evidence as is afforded by the revenue survey of 1859, there is no trace of any territory as existing between Pergunnah Bijura and Pergunnah Taraf.

4. Fisher's report discloses two important facts. The hills immediately adjoining Bijura were at the time in the possession of the Rajah. Bishgaon had been purchased by the Rajah, and his influence in Bishgaon is described as even greater than his influence at Balisira. Now his influence at Balisira had consisted in this, that, having purchased certain Pergunnahs, he asserted that the hill land which was properly attached to the Pergunnahs, and in respect of which Jumka-Jumma had been paid by the proprietor of the settled Pergunnahs, was his as independent property.

5. There are concurrent findings of fact by the two Courts that the lands in question were *de facto* in the possession of the plaintiff and his predecessors since the beginning of the 19th century. It is probable that, if asked, the Rajah would have sought to ascribe his possession to his independent territory, so long as the boundary was not conclusively settled against him. But that does not alter

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the fact of possession: and it is to be remembered that the testimony given by Fisher as to the practical occupation is given at the very moment that he decides that these lands do not form part of the independent Raj. This testimony is reiterated by Reynolds. In the circumstances, and taking the concurrent findings of fact as to possession as the basis of their judgment, their Lordships have come to the conclusion that it is fair to ascribe this possession to the property which the Rajah undoubtedly had in Tuppa Bishgaon.

The only circumstances which, in their Lordship's opinion, led the Court of Appeal to prefer to rest their judgment on 60 years' possession and not upon the Pergunnah title, was the fact that in the revenue survey of 1859 the various mouzahs which undoubtedly form part of Pergunnah Bishgaon are not shown as extending as far as these lands: and that there is shown a tract of unoccupied territory, to which the name of the Raghunandan hills is given, extending from the boundary of the mouzahs to the ridge of hills which bounds Bijura. Their Lordships have always given great weight to the accuracy of the survey maps. They are not conclusive, but in the absence of evidence to the contrary they will be presumed to be accurate. The present case, however, is somewhat peculiar. The Raghunandan hills were admittedly not surveyed: and their Lordships do not think that there was material before the surveyor in 1859 to settle the extent of possession held in connection with Tuppa Bishgaon in 1793—1840 and onwards.

The fact of possession as found by the two Courts in this particular case and for these particular plots, therefore, seems to their Lordships to overweigh what may be called the negative evidence of the map.

This disposes of the case as against the Secretary of State on the general question, there being a concurrent finding of fact as to possession within 12 years so as to exclude the plea on limitation. But there remains a special plea affecting plot 3. This plot was undoubtedly sold by the Government as waste land, and the sale was not in any way stopped or interfered with by the Rajah. In these circumstances the Defendants rely on section 18 of the Waste Lands Act, No. 23 of 1863, which provides that no claim to any land or to compensation or damages in respect of any land sold or otherwise dealt with on account (of) Government as waste land shall be received after the expiration of three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with. The suit here is admittedly more than three years after delivery.

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In order to deal with this plea, it is necessary to consider the scheme of the Act.

It provides that when waste lands are proposed to be sold by the Government, there must be a period mentioned in the advertisement as to the sale or disposition of the lands not less than three months within which any competing claim to the land in question must be intimated.

If such claim is intimated the sale, pending investigation, is suspended. The Collector then inquires into the claim, and either allows or rejects it. If it is rejected the claimant must, within one week of the rejection, institute an appeal; failing which institution the rejection order is final. It is then provided that in any district the Local Government shall constitute a special Court for the adjudication of such claims; that notice of such constitution shall be given by proclamation, and that, after such proclamation, the jurisdiction of all Courts other than the special Court, as to claim to the land is abolished. Then after provisions as to the procedure of the special Court comes section 18 already partially quoted. Section 19 then provides that in any case in which land has been sold, if the Court is of opinion that the claim of the claimant has been established, the Court shall not award him possession of the lands, but shall order him to receive a sum of money from the Treasury in compensation.

The Subordinate Judge held that all this procedure only applied to lands held by the Government. The Court of Appeal hesitated to accept this view, and their Lordships think it is clearly wrong. For the very fact of providing special machinery to adjudicate on claims by other people to land which the Government are practically dealing with by means of sale, is destructive of the idea that the action is not applicable except in cases where in other Courts the Government could show it had a title.

The learned Appeal Court have treated the matter in the only way it was argued before them, viz., as a question of jurisdiction; and held that as the jurisdiction of the ordinary Courts was only ousted on proclamation made of the constitution of the special Court, and as no technical proof had been given that any such Court was constituted, the ordinary Courts were not ousted.

Their Lordships agree that this is so, but it would scarcely be a satisfactory ground on which alone to decide the case, as the point not having been taken by the Subordinate Judge, their Lordships think that under sanction of costs the appellant might have been granted leave by the Court of Appeal to lead additional evidence

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to the effect that the Court had been constituted and proclamation made. There is, however, another good ground which, in their Lordships' view, is fatal to the appellant's contention. This Act is drastic in its character, and makes a great invasion on private rights. Those pleading it must therefore bring the matter strictly within its provisions. Now the whole of the provisions beginning with section 1, as to notices to be given to the Collector, advertisements, &c., clearly point to the necessity of proper intimation being given by the Government as to the proposed sale. The notice must be clear and not misleading, for otherwise how is the true owner if such exists to realise the necessity of coming forward? Now here the notice was quite misleading, for it advertised a sale of lands in Bijura, whereas the lands in question were certainly not in Bijura, whether they were in Bishgaon or Taraf.

Their Lordships think, therefore, that as against the plaintiff the whole proceedings fail for want of proper basis. The provision as to the three years in section 18 is clearly applicable, as the concluding words of the section show, to the proceedings before the Special Court and that Court alone.

Their Lordships will therefore humbly advise His Majesty as against the defendant the Secretary of State in Appeal No. 126 of 1911 to dismiss his appeal with costs.

It has been intimated to their Lordships that leases of the lands in the possession of the third and fourth respondents in Appeal No. 4 of 1912 have been entered into between the Maharaja and these parties. Their rights will now be governed by the leases and it is unnecessary for their Lordships to make any recommendation to His Majesty in connection with this Appeal which will be dismissed without costs on either side.

Solicitor, India Office:—Solicitor for the Government.

T. L. Wilson & Co.:—Solicitors for the Plaintiff.

Sanderson, Adkin, Lee & Eddis:—Solicitors for the Tea Companies.

J. M. P. *Appeals dismissed.*

PRESENT: *Lord Shaw, Lord Moulton and Mr. Ameer Ali.*

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A. H. FORBES

v.

MAHARAJ BAHADUR SINGH.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Landlord and tenant—Decree for rent—Decree, execution of, by assignee—Sale, advertisement of, under Putni Regulation—Putni Regulation (VIII of 1819), Sec. 13—Deposit by under-tenure holder—Bengal Tenancy Act (VIII of 1885), Sec. 65—First charge, when—Dur-putnidar's lien, priority of—Statutory Salvage lien—Scopes of the Act and Regulation.

A certain zemindari was settled in *putni* and was held for some years by the defendant D, as *putni* talukdar, who, in his turn, settled the *putni* tenure in several parcels with durputnidars. Two of these durputnis were held by the plaintiff. The zemindar on the 27th June 1893, transferred the zemindari, subject to defendant's *putni*, to B. Certain arrear of rent in respect of the *putni* had become due before the sale to B. For these arrears the zemindar brought a suit on the 21st September 1893. The final decree was passed on the 10th July, 1896. Nine days after, the zemindar executed a deed of trust by which he assigned to the defendants Nos. 2 to 4 (Respondents Nos. 2 to 4) in trust for defendant M among other properties the decree for arrears of rent. D died shortly after, leaving M his only son and heir. In 1897 the trustees proceeded to execute the decree. In the meantime further arrears became due to recover which the purchaser of the zemindari took proceedings under *Putni* Regulation and the plaintiff, the dur-putnidar, deposited the amount of arrears in the Collector's Court and was put by him in possession of the *putni* taluk. In a suit brought by him for a declaration that he had a first charge on the *putni* for the sum deposited by him, and for an injunction to restrain the defendants (persons to whom the ex-zemindar had assigned the decree for arrears of rent) from executing the decree:

Held, that the decree was not one for rent within the meaning of section 65 of the Bengal Tenancy Act, that he could execute the decree against the debtor as a money-decree and had no remedy against the tenure or holding itself.

That neither from the nature of the debt being arrears of rent, or the decree being for arrears of rent, it could be urged that the tenure became *ipso facto* hypothecated for the debt, as under section 65 of the Bengal Tenancy Act the charge was in favour of the landlord.

Khetra Pal Singh v. *Kritarthamoyi Dassi* (1) distinguished.

The right to bring the tenure or holding, as the case may be, to sale under section 65 of the Bengal Tenancy Act, exists so long as the relationship of landlord and tenant exists. A person, therefore, to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right.

(1) (1906) I. L. R. 33 Calc. 566; 3 C. L. J. 470.

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Sections 65 and 66 of the Bengal Tenancy Act, taken together, cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced under section 148 (h) of the Act, the right to apply for the execution of a decree for arrears was attached to the status of a decree-holder *qua* landlord. The prohibition contained in that section, refers to decrees obtained by the landlord under section 65. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interests 'vested' in him.

Held, further, that the plaintiff, by his deposit of the arrears for which the superior tenure was advertised for sale at the instance of the purchaser of the zemindari, acquired the special lien created by the *Putni* Regulation, which may well be called a statutory salvage lien arising not from any implication of the law but under the express directions and declarations of the Regulation in sections 8, 11, 13 and 13 (2).

That the special lien which a subordinate tenure-holder acquired, was not affected by proceeding taken in respect of the *putni* under the Bengal Tenancy Act, the *Putni* Regulation being a self-contained statute, was specially excluded from the operation of the Bengal Tenancy Act by section 195 of that Act.

Maharaj Bahadur Singh and others v. *A. H. Forbes and others* (1) reversed.

Appeal by the Plaintiff.

The facts of the case are sufficiently stated in the judgment of the High Court reported in *Maharaj Bahadur Sing and others* v. *A. H. Forbes* (1).

The principal questions were: (1) whether section 148 (h) of the Bengal Tenancy Act would operate as a bar to the execution of the decree dated 10th July, 1896 by the assignees (respondents 2 to 4); (2) whether that decree was a rent decree within the meaning of that Act and could be executed as such thereunder; (3) whether the deposit by the appellant as *durputnidar* under section 13 of the Putni Regulation, and the continuous possession of the said tenure after such deposit, formed a charge thereon in priority to a charge alleged and claimed by the respondents; and (4) whether the respondents 2 to 4 were entitled to sell the said *putni* in execution of their own decree free from the appellant's charge.

De Gruyther K. C. and *A. M. Dunne* for the Appellant: The decree of the 10th July, 1896, was not a decree for rent within the meaning of section 65 of the Bengal Tenancy Act. The zemindar, when he sued for arrears of rent, ceased to be the landlord. The decree could be executed under the provisions of the Civil Procedure Code: See section 148 (h) of the Bengal Tenancy Act.

(1) (1908) 7 C. L. J. 652.

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Reference was made to Regulation VIII of 1819. the Preamble and sections 4, 8, 11 and 13; Bengal Tenancy Act, sections 9, 10, 55, 56, 65, 66, 68, 103, 121, 148, 161 (*a*), 162, 165, 169 and 195 (*e*); Land Registration Act, sections 28, 38, 39, 42, 76, 78 and 79; and Civil Procedure Code of 1882, section 232. Sections 65 and 66 of the Bengal Tenancy Act, when read together, refer only to a landlord in possession of the zemindari at the time when proceedings to obtain the rent are taken. The mere fact of a person being registered, as owner of a tenure under the Land Registration Act, was not sufficient to entitle him to sue for the rent when he is not the actual owner: *Ramkristo* v. *Harain* (1).

The decree could only be executed as money-decree and not as a rent decree. See section 148 (*h*) of the Bengal Tenancy Act. The case of *Chhatrapat* v. *Gopi Chand* (2) was wrongly decided. The respondents were assignees within the meaning of section 148(*h*) of the Act. That case was not in accord with other decisions of the Court: See *Hem* v. *Mon Mohini* (3). This last case was followed in *Srimant* v. *Mahadeo* (4). In the Full Bench case of *Khetra Pal* v. *Kritarthamoyi* (5), the land was in possession at the time he instituted the suit. Reference was also made to *Faez Rahaman* v. *Ramsukh* (6); *Soshi* v. *Gogan* (7) and *Nagendra* v. *Bhuban* (8). The decree of 10th July, 1896, could not in any case affect the rights of the appellant under Putni Regulation.

Sir R. Finlay K. C. and *Ross K. C.* for the Respondents: The decree was a decree for rent which could be executed by the respondents 2 to 4 under the provisions of the Bengal Tenancy Act; the claim for rent of the holder of that decree became a first charge under section 65, on the *putni* tenure, and was entitled to priority over the lien, if any, of the appellants. The words of section 65 were quite clear, it did not provide that the landlord must be an existing landlord, whereas in section 66 it is specifically so provided. The meaning of section 65 is that the decree becomes a first charge from the date of the decree and not before. It did not cease to be rent because the landlord had transferred his land. There was nothing in the preamble to the Act which showed that the Act did not apply to the case of an ex-landlord. There are

(1) (1882) I. L. R. 9 Calc. 517.
(2) (1899) I. L. R. 26 Calc. 750 (751, 752, 757).
(3) (1899) 3 C. W. N. 604.
(4) (1904) I. L. R. 31 Calc. 550 (554).
(5) (1906) I. L. R. 33 Calc. 566; 3 C. L. J. 470.
(6) (1893) I. L. R. 21 Calc. 169.
(7) (1894) I. L. R. 22 Calc. 364 (374).
(8) (1901) 6 C. W. N. 91.

certain sections viz., sections 66 and 67 that apply to ex-landlords. The *putni* tenure could lawfully be sold in execution of the decree of 10th July, 1896, free of any such lien. *Chhatrapat* v. *Gopi Chand* (1) explained. Any person entitled to sue for arrears of rent before the assignment was entitled to the remedy provided by section 65, which applied just as much to the ex-landlord as to the one in possession. Reference was made to Regulation VIII of 1819, section 13 (4); Bengal Tenancy Act, sections 9, 20, 60, 65, 66, 67, 68 (1) and (2), 69, 102, 121, 148, 158, 159, 160, 165, 167, 169 (1) and 195; Civil Procedure Code of 1882, sections 232, 278; and Land Registration Act, sections 28, 29, 38, 39, 42, 76, 78, 79. The name of the landlord must be in the register at the time the rent for which a suit is brought, was due; but it could not be the case that the landlord lost his right to sue for arrears of rent because another name had been put on the register since the arrears became due. *Ramkristo* v. *Harain* (2) distinguished. Reference was made to Ameer Ali's Bengal Tenancy Act, page 527; and section 195 of the Bengal Tenancy Act. Execution was applied in December, 1896 and the decree-holder was entitled to be in priority to the appellant. A trustee is not included in the word 'assignee' as used in section 148 (*h*).

De Gruyther in reply.

The *putni* tenures are to be governed by *Putni* Regulation, and the other tenures by the Bengal Tenancy Act. The respondents are not entitled to set aside any statutory charge created under the Regulation not the *durputni*.

The judgment of their Lordships was delivered by

Mr. Ameer Ali.—This Appeal, which is from a judgment and decree of the High Court of Calcutta, dated the 8th of April, 1908, raises certain questions of particular importance under the Rent Law of Bengal, for the proper apprehension of which it is necessary to set out in some details the facts of the case.

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The Zemindari of Lot Saifganj, situated in the district of Purnea, was owned at one time by a rich zemindar of the name of Roy Dhanpat Singh, since deceased. The estate, however, was settled in *putni*, and has been held for some years past by the Defendant Chatrapat Singh as the *putni* Talukdar; Chatrapat, on his side, has settled the *putni* tenure in several parcels with subordinate tenure-holders called *dar-putnidars*. Two of these *dar-putnis* are held by the Plaintiff Appellant. These tenures are special to Bengal,

(1) (1899) I. L. R. 26 Calc. 750 (760).
(2) (1882) I. L. R. 9 Calc. 517 (519).

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the Sonthal Pergunas and certain parts of Chota-Nagpur, and their incidents are governed by Reg. VIII of 1819, commonly called the Putni Regulation. To some of these incidents reference will be made in the course of this Judgment.

But it may be conveniently premised here that a *putni* talook is a permanent, heritable and transferable tenure, which the Zemindar may create over the whole or part of his estate, whilst the *putni* talookdar has a similar right to let the entire property held by him in *putni* or in parcels to subordinate talookdars called *dar-putnidars*. And this process of sub-infeudation may, so far as the law is concerned, be carried down to several lower degrees. In the case of these tenures the Zemindar has a right to apply to the Collector to put up the *putni* talook to sale for arrears of rent, and the sale has the effect of cancelling all undertenures; but the subordinate tenure-holders have the right to deposit in the Collector's Court the arrears of rent, and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the Zemindar possesses for the realisation of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale, is given to them in succession.

On the 27th of June, 1893, Dhanpat Singh transferred the Zemindari, subject of course to Chatrapat's *putni*, to a Hindu lady, Bhagwanbati Chowdhrain, who has unquestionably been in possession of the estate since her purchase.

It appears that certain arrears of rent in respect of the *putni* had become due before the sale to Bhagwanbati Chowdhrain. For these arrears Dhanpat Singh brought a suit in the civil Court on the 21st September, 1893. The final Decree in this action was passed by the High Court on the 10th of July, 1896. Nine days after, Dhanpat Singh executed a deed of trust by which he assigned to the defendants 2 to 4 in trust for the defendant Maharaj among other properties the decree for arrears of rent.

Dhanpat Singh died shortly after, leaving Maharaj his only son and heir.

In 1897 the trustees proceeded to execute the decree against Chatrapat but were met with various objections on his part which were finally overruled by the High Court in 1899.

In the meantime Chatrapat had fallen into arrears in respect of the *putni* rent payable to the Chowdhrain, and that lady had instituted in the Court of the Collector of Purneah the special proceedings under Reg. VIII of 1819 for the realisation of her dues. The

defaulting tenure was accordingly advertised for sale on the 14th of May, 1901. The plaintiff appellant thereupon deposited the amount of the arrears in the Collector's Court and was put by him in possession of the *putni* talook. Since then he has been and still is in possession of the superior tenure paying rent to the zemindar and realising the rents due to the *putni* talookdar from the subordinate holders.

The Trustee defendants, having obtained the decision of the High Court that they were entitled to execute Dhanpat Singh's decree, applied for the sale of the *putni* talook under section 163 of the Bengal Tenancy Act. It is to be observed that a sale held under this section does not give power to the decree-holder to annul "notified and registered incumbrances." The plaintiff thereupon preferred a claim under section 278 of the Civil Procedure Code of 1882, which, however, after some protracted proceedings, was withdrawn. Apparently a sale under section 163 was held, but it did not fetch a sum sufficient to liquidate the arrears and costs, and the defendants then applied for a sale under section 165 under which the decree-holder has the power to annul all incumbrances including under-tenures. On this application the 6th of August, 1906, was fixed for the sale of the *putni*. The present suit was then brought by the plaintiff on the 9th July in the Court of Subordinate Judge of Purneah to restrain the defendants from proceeding with the sale.

It should be noted here that there exist many permanent, heritable, and transferable tenures in Bengal which do not come within the purview of Reg. VIII of 1819, and which have no relation to *putni* talooks. The incidents of these tenures are governed by the Bengal Tenancy Act passed in 1885, to regulate, subject to certain exceptions to which attention will be drawn, the relations in general between landlord and tenant.

The Bengal Tenancy Act of 1885, whilst it protected the permanent tenure-holder and other tenants having similar permanent interests against ejectment for arrears of rent, gave to the landlords certain rights which they either did not possess before or possessed only in a qualified form. One was the right to bring to sale the tenure or holding in execution of a decree for arrears of rent. Section 65, which declares this liablity of the defaulting tenure, also declares that "the rent shall be a first charge thereon." It is round these words that the controversy between the parties is mainly centred. Their Lordships say mainly, because there is another question of vital importance in this case which relates to the

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applicablity of the provisions of the Bengal Tenancy Act to *putni* tenures.

The Defendants in their endeavours to bring Chatrapat's *putni* taluk under the provisions of section 165 of the Tenancy Act, contend that as the relationship of landlord and tenant existed between Dhanpat Singh and Chatrapat when the rents became due, the decree obtained by him became by virtue of section 65 a first charge on the tenure. The Plaintiff's contention, on the other hand, is that as Dhanpat Singh had parted with his interest in the zemindari before the institution of his suit for arrears the decree of which execution was sought was not a rent decree within the meaning of section 65.

The subordinate Judge has upheld the plaintiff's contention, and granted him an injunction restraining Maharaj Bahadur and the trustee defendants, who are called in the suit "first party defendants," from executing their decree of the 10th of July 1896 against the *putni* under the provisions of the Bengal Tenancy Act. His decision has been reversed by the High Court on appeal and the plaintiff's suit been dismissed with costs. The learned Judges considered that the decree being for rent the mere fact that the zemindar had sold the estate after it became due does not affect his right to "a first charge." At least that is what their Lordships understand to be the meaning of the learned Judges in the following passage of their judgment :—

"The decree of the 10th July 1896 is a decree for rent. Rai Dhanpat Singh was the landlord at the time when the rent he sued for accrued due. His claim for rent when found due, became a 'first charge' on the *putni*. There is nothing in the law which disentitles him to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the zamindari."

This conception is further developed at a later stage of their judgment, where they say as follows :—

"Now, no doubt, the decision of this Full Bench does not deal with a case such as the present in which the landlord had parted with his interest before he instituted his suit for rent, but it would seem to follow that if he can execute a decree for arrears of rent as a rent decree after he has parted with his interest as landlord, he can also do so when he obtained his decree for rent, even after he had parted with his interest in the property. The character of the decree a suitor obtains, depends on the nature of the claim and of his right to the relief sought for, and is not altered by any charge in his

position which may have taken place subsequent to the accrual of his right to sue."

Their Lordships cannot help observing that the learned Judges have fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal. In the Full Bench case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (1), the landlord did not part with the property and put an end to the relationship of landlord and tenant until after the decree in his suit for rent; whereas in the present case he transferred his interest to Bhagwanbati Chowdhurain before his suit for the arrears. The broad question, however, for determination in this appeal is whether the special right created in favour of the landlord under section 65 can be claimed also by one who has parted with the property which gives this right and to which it is attached.

There is no doubt that there is a divergence of opinion among the Judges of the High Court of Calcutta with regard to the construction of section 65. The section itself runs as follows :—

"Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

It is not a happily worded section, and the words "and the rent shall be a first charge thereon," seem, from their collocation, to have been inserted as an after-thought without sufficient consideration of their applicability to the rest of the provisions contained in the section. They give no indication as to when it becomes a "first charge." Does it become a first charge from the nature of the claim, as some of the learned Judges seem to imagine, or does it become a first charge after it has been ascertained and made the subject of a decree ? Again, the section does not sufficiently indicate at whose instance the tenure or holding shall be liable to sell in execution of a decree for rent thereof, though from the reason of the thing it is obvious that it must be at the instance of the landlord.

These questions cannot, therefore, be answered by a reference to the mere section itself; to understand its meaning, their Lordships apprehend, the general scope of the statute as well as of the chapter in which it occurs, must be taken into consideration. The

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Act, as stated in the preamble, was designed "to amend and consolidate certain enactments relating to the law of landlord and tenant." The words "tenant," "landlord," and "rent," are carefully defined. "Landlord" is declared to mean "a person immediately under whom a tenant holds, and includes the Government," whilst "rent," is declared to mean "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant." Chapter VIII embodies the "general provisions as to rent." After dealing with "rules and presumptions as to amount of rent," "the alteration of rent," "the payment of rent," "receipts and accounts," "deposit of rent" in Court when the landlord refuses to receive payment, it treats of "arrears of rent." The governing idea throughout the multifarious provisions contained in chapter VIII to regulate the respective rights and obligations of landlords and tenants, is the subsistence of the relationship that gives rise to those rights and obligations.

Section 65 declares that a certain class of tenants shall not be liable to ejectment for "arrears of rent," but that their tenure or holding "shall be liable to sale in execution of a decree for the rent thereof." Section 66 provides that in the case of other tenants not coming within the purview of section 65, the landlord "may institute a suit to eject" the defaulting tenant. The two sections taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. A reference to sections 148, cl. (h), clearly shows that the right to apply for the execution of a decree for arrears was attached to the status of the decree-holder *qua* landlord. It declares that "notwithstanding anything contained in section 232 of the Civil Procedure Code an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him."

The prohibition contained in this section refers to decrees obtained by the landlord under section 65. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interests "vested" in him. In other words, the right to bring the tenure or holding,

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as the case my be, to sale exists so long as the relationship of landlord and tenant exists.

It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under section 65 appertains exclusively to the landlord ; and that a person to whom certain rents are due, and, who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation. A zemindar to whom certain arrears are due, as in the present case, may sell his property, without assigning, for purposes of his own, the back rents as he is entitled to do ; he may then sue for those back rents ; before any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtain decrees for their respective arrears. For whose decree and on whose application is the tenure to be sold? The question admits of only one answer—that it is the existing landlord alone who can execute the decree ; the ex-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself.

The learned Judges of the High Court seem to think that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated so to speak for the debt ; and that consequently the person to whom the debt is due, although he has ceased to be the landlord, and is to all intents and purposes so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligations are inseparably connected, he has the special remedy given to the landlord to recover arrears attached to the tenure. This conception of the legal position seems to their Lordships untenable, for the charge created by section 65 is clearly in favour of the landlord.

There is another equally fatal objection to the application of the contesting defendants to bring to sale the *putni* tenure in execution of Dhanpat Singh's decree.

The Putni Regulation is a self-contained Statute. It lays down certain well-defined rules for the realisation by the zemindar of arrears of rent from a tenure-holder ; it makes the tenure primarily liable, and it gives to the zemindar the right of applying to the Collector for the periodical sale of defaulting taluks.

Section 8 provides for the manner in which the zemindar, that is,

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"the proprietor under direct engagement to Government," shall be entitled to apply for the sale of these tenures.

Section 11 declares that—"Any taluk or saleable tenure that may be disposed of at a public sale, under the rules of this Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assignees."

It is unnecessary to refer to the rest of this section for the purposes of this judgment.

Section 13 provides the method by which the "holder of a taluk of the second degree" may save his tenure "from the ruin that must attend" the sale of the superior tenure.

Sub-section 2 declares—"Whenever the tenure of a talukdar of the first degree may be advertised for sale in the manner required by the second and third clauses of section 8 of this Regulation, for arrears of rent due to the zemindar, the talukdars of the second degree, or any number of them, shall be entitled to stay the final sale, by paying into Court the amount of balance that may be declared due by the person attending on the part of the zemindar on the day appointed for sale; in like manner they shall be entitled to lodge money antecedently, for the purpose of eventually answering any demand that may remain due on the day fixed for the sale, and, should the amount lodged be sufficient, the sale shall not proceed, but, after making good to the zemindar the amount of his demand, any excess shall be paid back to the person or persons who may have lodged it."

And sub-section 4 after referring to certain conditions which it is unnecessary to consider here, declares that "such deposit shall not be carried to credit in, or set against, future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the taluk so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon, in the same manner as if the loan had been made upon mortgage; and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto."

It will be seen, therefore, that the appellant in this case, by his admitted deposit of the arrears for which the superior tenure was advertised for sale at the instance of the Chowdhrain zemindar, acquired the special lien expressly created by the Regulation which

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may well be called a statutory salvage lien arising not from any implication of the law but under the express directions and declarations of the Act.

Regulation VIII of 1819 being thus, as already observed, a self-contained Act embodying the rules relative to the rights of zemindars and *putni* talukdars, the Legislature in enacting Act VIII of 1885 excluded in express terms from the operation of the Tenancy Act the special legislation relating to *putni* tenures. Section 195 of Act VIII of 1885 declares (omitting the immaterial portions) that "nothing in this Act shall affect......... any enactment relating to *putni* tenures, so far as it relates to those tenures."

The Plaintiff's right to hold the *putni* taluk exempt from any proceeding under the Tenancy Act, is founded on steps taken by him under the *Putni* Regulation.

For these considerations, their Lordships are of opinion that the judgment and decree of the High Court should be set aside, and the decree of the Subordinate Judge restored. The first party defendants, the contesting respondents, must pay the costs of this appeal and of the appeal to the High Court.

And their Lordships will humbly advise His Majesty accordingly.

T. L. Wilson & Co.—Solicitors for the Appellant.

Downer & Johnson—Solicitors for the Respondents.

A. T. M. *Appeal allowed.*

CRIMINAL REVISION.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr. Justice Richardson.

PROFULLA KUMAR GHOSE AND ANOTHER

v.

HARENDRA NATH CHATTERJEE.*

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August, 9, 10.

Prosecution, maintainability of—Penal Code (Act XLV of 1860), Sec. 211, sanction for prosecution under, refused—Prosecution for offence under section 500 I. P. C. on the same facts, if legal—Criminal Procedure Code (Act V of 1898), Sec. 195.

A person who having been accused of an offence by another, has been discharged or acquitted, cannot be allowed to evade the provisions of section 195

* Criminal Revision No. 702 of 1916.

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of the Criminal Procedure Code by preferring a complaint under section 500 of the Indian Penal Code, when leave has been refused to prosecute under section 211 of the Penal Code, the offence charged being clearly and essentially an offence under the latter section.

Quaere : Sanderson, C. J. : Whether the statement in the complaint, assuming that it was untrue to the knowledge of the person who made it and was made *bona fide*—is privileged, and whether the statement of privileges contained in the Indian Penal Code is exhaustive.

Per Richardson, J. ; Whether complainant and witnesses enjoy the same complete immunity in India as in England.

Petition for Revision under section 435 of the Code of Criminal Procedure.

Criminal proceedings were taken against the complainant Harendra Nath Chatterjee by the petitioners Profulla Kumar Ghose and Jogesh Chandra Sarkar under section 409 of the Indian Penal Code. The Magistrate who enquired into the complaint discharged the accused person Harendra. Thereupon Harendra applied for sanction under section 195 of the Code of Criminal Procedure to prosecute Profulla and Jogesh under section 211 of the Indian Penal Code, and in the alternative asked for process against these two persons under section 500 I. P. C. The Magistrate refused sanction under section 195 to prosecute the petitioners under section 211, but granted process under section 500. A Rule was obtained for quashing the proceedings against the petitioners under sections 500, $\frac{500}{109}$ I. P. C. which were pending trial in the Court of Mr. S. P. Sarbadhikary, Honorary Magistrate.

Babus Monmatha Nath Mukerjee, Khitis Chunder Sen and *Prabhat Chandra Dutt* for the Petitioners.

Babu Sures Chunder Talukdar for the Opposite Party.

The judgments of the Court were as follows :

August, 10.

Sanderson, C. J.—In this case criminal proceedings were taken against the complainant Harendra Nath Chatterjee by the petitioners Profulla Kumar Ghose and Jogesh Chandra Sarkar under section 409 of the Indian Penal Code. The Magistrate who inquired into the complaint in these proceedings came to the conclusion that it could not be substantiated and discharged the accused person Harendra Nath Chatterjee. Thereupon, Harendra Nath Chatterjee applied for sanction under section 195 of the Criminal Procedure Code to prosecute Profulla Kumar Ghose and Jogesh Chandra Sarkar under section 211 of the Indian Penal Code, and in the alterative asked for process against these two persons under section

500 of the Indian Penal Code. The Magistrate refused sanction under section 195 to Harendra Nath Chatterjee to prosecute the petitioners under section 211, but granted process under section 500.

An application was made to this Court by Mr. Monmotha Nath Mukerjee on behalf of the petitioners Profulla Kumar Ghose and Jogesh Chandra Sarkar, and he obtained a Rule which was granted on two grounds: The first ground was that the facts alleged in the petition of the opposite party did not disclose any offence under section 500 Indian Penal Code or $\frac{500}{109}$ Indian Penal Code. The second ground was, that the petition for sanction to prosecute under section 211 Indian Penal Code, having been rejected the petitioners ought not to be proceeded against under section 500 or $\frac{500}{109}$, Indian Penal Code on the same facts.

The Magistrate has sent an explanation with regard to that Rule, and after setting out what occurred he said this, "As I found *prima facie* no lawful and reasonable ground for the action taken by the petitioners against the said Harendra Nath Chatterjee under section 409, Indian Penal Code and the allegations in the petition of complaint in reference to the same charge were not made in good faith, I ordered the issue of process under section 500 Indian Penal Code."

I am of opinion that this Rule ought to be made absolute upon the second ground which I have already mentioned; and, I will give my reasons for that opinion directly.

A good deal of time has been taken up in arguing whether the statement in the complaint—assuming that it was untrue to the knowledge of the person who made it and was not made *bona fide*—was privileged, and incidentally, the question whether such a statement contained in a complaint was the subject of an unqualified privilege, or whether the only privilege which was applicable to defamation under the Indian Penal Code was that which is set out in the same code; in other words, whether the statement of privileges contained in the Indian Penal Code was exhaustive or not. Upon this matter I regret to say that I find there are numerous conflicting authorities in the Reports, and personally I should have been glad if this matter could have been referred to a Full Bench of this Court, in order that the matter might have been finally determined and settled one way or the other. But inasmuch as I am of opinion that the Rule ought to be made absolute upon the second ground, I do not think it would be fair or right to the petitioners to put upon them the burden and expense of having

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this case further adjourned in order that the point might be argued before Full Bench.

With regard to the second ground the reasons for my opinion are these. Having regard to the Magistrate's explanation which I have already read, if any offence was committed by the two petitioners Profulla Kumar Ghose and Jogesh Chandra Sarkar, to my mind, it was clearly an offence under section 211 of the Indian Penal Code. Section 211 says, "whoever with intent to cause injury to any person, institutes or causes to be instituted any criminal proceedings against the person, or falsely charges any person with having committed an offence knowing that there is no just or lawful ground for such proceedings or charge against that person shall be punished......"

Now, the Magistrate found, as stated in his explanation, that the statement in the complaint was untrue, that the petitioners had no lawful or reasonable ground for the action that they took, and that therefore their complaint against Harendra Nath Chatterjee was not made in good faith. On those facts, if any offence was committed at all, it was clearly under section 211, and yet the Magistrate on those facts refused to give his sanction under section 195. I ought to have said that proceedings for that offence could not be taken without the sanction of the Magistrate, and the Magistrate refused the sanction. The clear intention of the Legislature was that with regard to such an offence as that, proceedings should not be taken unless the sanction of the Court which investigated the matter had been obtained. In this case, the Magistrate having refused sanction, to prosecute under section 211 of Indian Penal Code went on to allow process to issue in respect of an alleged offence under section 500, that is to say defamation, which would be based upon the facts which I have already referred to, namely that the statement in the complaint was untrue and that the petitioners had no lawful and reasonable ground for the action taken by them, and that it was made without *bona fides*. If that were allowed to be done, then I think the provision of the Legislature which is contained in section 195 of the Criminal Procedure Code might just as well be wiped out. I think it would be wrong for us to allow process to issue for an offence under section 500 when the facts alleged if they constituted an offence at all could amount to an offence under section 211 and the sanction of the Magistrate necessary for a prosecution under section 211 had not been obtained. I think that the ground which I have already mentioned sums up exactly the position, namely, that "the petition for sanction

to prosecute under section 211 Indian Penal Code having been rejected, the petitioners ought not to be proceeded against under section 500 or $\frac{500}{109}$ Indian Penal Code on the same facts."

For these reasons I think that the Rule should be made absolute.

Just one matter I wish to add, that is with regard to the remark which the learned vakil who appeared for Harendra Nath Chatterjee made yesterday. He said that his client had been wrongly prosecuted and a false charge had been made against him and thereby a great reflection has been made upon his character: and, unless he was allowed to go on with this prosecution he would remain under that reflection. I wish to say that the fact that we are making this Rule absolute does not reflect upon the character of Harendra Nath Chatterjee in any shape or form:—No doubt a charge was made against him, but the Magistrate has come to the conclusion that there was no foundation for that charge and he has dismissed it. So far as Harendra Nath is concerned, he is able to walk the world as if no such charge has been made against him,—there is no reflection against his character so far as this Rule is concerned because, the ground upon which we have made this Rule absolute does not depend upon the merits of the case.

Richardson, J.—I agree. The question whether complainants and witnesses enjoy the same complete immunity in India as in England has been discussed in the various High Courts almost *ad nauseam* and has given rise to much difference of opinion. The stock arguments on the one side and the other are well known. On the present occasion it is unnecessary to consider those arguments or to hazard an opinion upon that question in its broader aspects. It is enough to say that in my opinion a person who having been accused of an offence by another, has been discharged or acquitted, cannot be allowed to evade the provisions of section 195 of the Criminal Procedure Code by preferring a complaint under section 500 of the Penal Code when leave has been refused to prosecute under section 211, the offence charged being clearly and essentially an offence under the latter section. The care taken to protect complainants from being harassed by prosecutions for instituting false cases is a clear indication that the Legislature never intended or contemplated that upon refusal of leave to prosecute under section 211, a person who has been discharged or acquitted should be allowed to fall back upon section 500. To permit such a course to be taken would render entirely nugatory

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the salutary provisions of section 195 of the Criminal Procedure Code.

The question moreover does not rest entirely upon inferences in regard to the intention of the Legislature. The offence charged in the present case, though it is described as an offence under section 500, is not altered by that description. It still remains an offence "punishable" under section 211. When the Magistrate had refused leave to prosecute under the latter section he ought not to have issued process under section 500.

There are only a few words I wish to add. It has been stated in the course of the argument on behalf of the opposite party that he appealed to this Court from the order refusing leave to prosecute under section 211 and that his appeal was rejected by a Bench of which I was the presiding judge. When that appeal came before us, all that we had was the order of the learned Magistrate refusing sanction. The order is in these terms, "The facts do not justify me in granting sanction under section 211, Indian Penal Code. Application rejected." We took that order to mean that the Magistrate in the exercise of his discretion having considered the facts, had come to the conclusion that there was no ground for prosecution under section 211. The opposite party had then already obtained process against the petitioner under section 500 of the Penal Code. It was in those circumstances that we rejected the appeal. At that time we had not what I suppose must be called the advantage of the explanation which the learned Magistrate has submitted in the present case. That explanation puts an entirely different complexion upon the matter and if it had been before us at the time of the hearing of the appeal, possibly we might have taken a different view. The fact however, that the appeal was dismissed can be no ground for making an order in this case other than the order we now propose to make.

So far as the reputation of the opposite party may have suffered by the charge or complaint made against him, it is not his fault that he has not been able to bring the question of the falsity of that charge to an issue. He has done his best to do so and I trust that his reputation will not be affected by a failure which cannot be attributed in any degree to him.

With these observations I agree with the learned Chief Justice that the rule should be made absolute.

A. T. M. *Rule made absolute.*

Before Mr. Justice Teunon and Mr. Justice Beachcroft.

CRIMINAL.

1916.

November, 29. December, 12.

K. SIMHACHALAM

v.

RATI KANTA LAHA.*

Indian Penal Code (Act XLV of 1860), Secs. 403, 406—Misappropriation of sums remitted by the complainant—Criminal Procedure Code (Act V of 1898), Secs. 177, 179, 181(2).—Jurisdiction—Criminal misappropriation, ingredients of—"Consequence which has ensued."

S, an official of an Insurance Company having its head office in the Madras Presidency, was charged under sections 403 and 406 of the Indian Penal Code, for misappropriating certain sums of money paid on account of an Insurance policy and remitted by the complainant by postal money order from Bengal :

Held that, the Court in Bengal had no jurisdiction to try the case.

Held further, section 179 of the Criminal Procedure Code did not apply to the case, inasmuch as to apply the provisions of the section it is essential that the offence should depend on an act done and on a consequence which has ensued. But loss to one person though a normal result of an act of misappropriation by another is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender, irrespective of any loss which may ensue to any other person.

Ganesh Lal v. *Nand Kishore* (1) and *Rambilas* v. *Emperor* (2) followed.

Queen-Empress v. *O'Brien* (3) and *Langridge* v. *Atkins* (4) dissented from.

Emperor v. *Mahadeo* (5) explained.

Criminal Revision :

The petitioner K. Simhachalam, was the Secretary of the Coromandal Life Assurance Company, having its head office at Bimlipatam in the Madras Presidency and carrying on business in Life and Marriage Insurance through its agents in various parts of India. The complainant Rati Kanta Laha was an agent of the Company at Krishnagar in the District of Nadia in Bengal ; and in that capacity he used to remit by postal money orders the premia collected by him from the policy holders, to the Secretary, K. Simhachalam, at Bimlipatam. On the 30th March, 1916, the complainant lodged a complaint before the Sadar Sub-divisional Magistrate of Krishnagar against K. Simhachalam, the Secretary, and the Managing Director of the Company, by which he charged

* Criminal Revision No. 1004 of 1916.

(1) (1912) I. L. R. 34 All. 487.
(2) (1914) M. W. N. 894.
(3) (1896) I. L. R. 19 All. 111.
(4) (1912) I. L. R. 35 All. 29.
(5) (1910) I. L. R. 32 All. 397.

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the accused with cheating and having misappropriated certain sums remitted by the complainant, and committed criminal breach of trust in respect thereof. The Magistrate issued a warrant against the managing Director only under section 406 of the Indian Penal Code, and the accused appeared, and having raised certain objection was discharged. The complainant then moved the District Magistrate for further enquiry, and the District Magistrate, while refusing to direct further enquiry against the managing Director, observed that the other accused K. Simhachalam should be summoned under sections 403 and 405 of the Indian Penal Code. The Sub-divisional Magistrate thereupon issued summons against K. Simhachalam under sections 403 and 406 of the Indian Penal Code, and the case was transferred for disposal to Babu Dasarathi Dutt, a Deputy Magistrate at Krishnagar. The accused, K. Simhachalam, then raised the plea of want of jurisdiction of the Magistrate to try the case, and the learned Magistrate over-ruled the objection of the accused.

The accused then moved the High Court for quashing the proceedings pending against him before the Deputy Magistrate at Krishnagar, and hence the Rule.

Mr. K. N. Chaudhuri and *Babu Debendra Narain Bhattacharya* for the Petitioner.

Mr. Camell (*Deputy Legal Remembrancer*) for the Crown.

Babus Manmatha Nath Mukherjee and *Narendra Kumar Bose* for the Opposite Party.

C. A. V.

The judgment of the Court was as follows :

December, 12.

The question for our consideration in this Rule is one of jurisdiction. The complainant has brought charges under sections 403, 406 of the Indian Penal Code in the Court of the Magistrate at Krishnagar in the District of Nadia, against the petitioner, an official of an Insurance Company having its head office at Bimlipatam in the Madras Presidency, alleging that he has misappropriated certain sums of money paid on account of an Insurance Policy. The question is whether the case can be tried in the Nadia Court.

Chapter XV of the Code of Criminal Procedure deals with the jurisdiction of Criminal Courts. Section 177 provides the general rule that an offence must ordinarily be tried in the Court within the local limits of whose jurisdiction it was committed. Then follow a number of enabling sections which extend the jurisdiction of Courts. One of these, section 181 (2), provides specially for the trial of the offence of criminal misappropriation. By it the offence

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may be tried by a Court within the local limits of whose jurisdiction any part of the property, the subject of the offence, was received or retained, as well as by the Court, which is given jurisdiction by section 177.

Now when the Code in express terms enumerates the Courts which have jurisdiction in language which is apparently exhaustive, if it is sought to establish the fact that another enabling section still further extends the jurisdiction, we must only give effect to the argument if the Court claiming jurisdiction comes strictly within the terms of the section.

The Crown contends that section 179 is such an enabling section. That section provides that "when a person is accused of the commission of an offence by reason of anything which has been done and of any consequence which has ensued, such offence may be tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued." In the present case the money was received at Bimlipatam and it is not suggested that the conversion of the property to the use of accused took place anywhere else. But it is argued that loss was caused to the complainant in Nadia and therefore by the application of section 179 the Nadia Court has jurisdiction.

Now for the application of section 179 it is essential that the offence should depend on an act done and on a consequence which has ensued. But loss to one person, though a normal result of an act of misappropriation by another is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender, irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued, but only on the act which has been done. Section 179 therefore does not in terms apply.

There is no reported decision on the point in this Court. The case of *W. B. Colville* v. *Kristo Kishore Bose* (1) has no application, as the charge there was of cheating. In the Madras Court the case of *Rambilas* v. *Emperor* (2) is in favour of the petitioner. In the Allahabad Court there have been contrary decisions. The case of *Queen Empress* v. *O' Brien* (3) which has been followed in *Langridge* v. *Atkins* (4) supports the Crown, while that of *Ganesh Lal* v. *Nand Kishore* (5) supports the petitioner. The case of *Emperor* v. *Mahadeo* (6) is not exactly in point as the

(1) (1899) I. L. R. 26 Calc. 746.
(2) (1914) M. W. N. 894.
(3) (1896) I. L. R. 19 All. 111.
(4) (1912) I. L. R. 35 All. 29.
(5) (1912) I. L. R. 34 All. 487.
(6) (1910) I. L. R. 32 All. 39.

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Court held that the acts of embezzlement must have taken place at Mirzapore or at one of the districts where the accused travelled. It also held that section 182, Criminal Procedure Code was applicable. The cases of *Ganesh Lal* v. *Nand Kishore* (1) and *Rambilas* v. *Emperor* (2), in our opinion, express the correct view.

The Rule is therefore made absolute and the proceedings against the petitioner are quashed.

A. N. R. C. *Rule made absolute.*

(1) (1912) I. L. R 34 All. 487. (2) (1914) M. W. N. 894.

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

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June, 30.

HRIDAY NATH PARAI AND ANOTHER

v.

AKSHAY LAL CHAUDHURI AND OTHERS.*

Suit, withdrawal of—Plaintiff failing to produce evidence in support of his claim—Civil Procedure Code (Act V of 1908), O. 23 R. 1 Sub-R. (2) cls. (a) and (b).

An order for withdrawal of a suit under rule (1) of order 23 of the Code of Civil Procedure cannot properly be made on the ground that the plaintiff had failed to produce evidence in support of his claim. Clause (*b*) of rule 1 sub-rule 2 should be read in conjunction with cl. (*a*). Hence the grounds included in clause (*b*) must be of the same nature as the ground specified in clause (*a*).

Kharda Co. Ld. v. *Durga* (1); *Mahulla* v. *Hemangini* (2) and *Kali Prasanna* v. *Panchanan* (3) referred to.

Application for revision under section 115 of the Civil Procedure Code by the Defendants.

Suit for recovery of possession of land on establishment of title.

The material facts and arguments appear from the judgment.

Babu Bankim Chunder Mukherjee for the Petitioner.

None for the Opposite Party.

* Civil Rule No. 289 of 1916, against an order of Babu Kedar Nath Chaudhuri, Subordinate Judge of Jessore, dated the 22nd January, 1916.

(1) (1909) 11 C. L. J. 45. (2) (1910) 11 C. L. J. 512.
(3) (1916) 23 C. L. J. 489.

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The Judgment of the Court was delivered by

Mookerjee, J.—We are invited in this Rule to set aside an order of a peculiar character, made ostensibly under Rule 1 of Order 23 of the Code of Civil Procedure. The plaintiffs instituted a suit for recovery of possession of land on establishment of title. The Court of first instance dismissed the suit on the ground that the evidence adduced by them was not sufficient to prove their claim. Upon appeal, the plaintiffs made an application for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action; this was taken up for consideration at the time of the hearing of the appeal. The Subordinate Judge came to the conclusion that the plaintiffs had not produced important items of evidence and that, in the absence of such evidence (which was admittedly with the plaintiffs), it would be difficult to come to any satisfactory finding on the question of title, although the documents already proved, on their behalf raised a presumption in their favour. The Subordinate Judge also held that the defendant had not produced on their side all the evidence necessary to prove their allegation. In these circumstances, he considered that in the interests of justice, the prayer for withdrawal should be granted and proceeded to record an order to the effect that the appeal should be dismissed, but that the suit should be allowed to be withdrawn with liberty to bring a fresh suit on the same cause of action, if not otherwise barred and subject to payment by the plaintiffs to the defendants their costs in his Court and in the trial Court. This order is manifestly self-contradictory; the Subordinate Judge has overlooked that if the appeal was dismissed, the suit could not very well be allowed to be withdrawn, as the decree of dismissal would operate as *res judicata* between the parties in respect of all questions in controversy in the suit. It is also plain that the reason assigned by the Subordinate Judge does not justify an order for withdrawal under Rule 1 of Order 23, Civil Procedure Code. The decisions in *Kharda Co. Ld.* v. *Durga Charan Chandra* (1), *Mabulla Sardar* v. *Rani Hemangini Debi* (2) and *Kali Prasanna* v. *Panchanan* (3), show that an order under Rule (1) of Order 23 cannot properly be made on the ground that that the plaintiffs had failed to produce evidence in support of their claim. Clause (*b*) of Rule 1 must be read in conjunction with clause (*a*), and, when they are so read, the intention of the Legislature becomes patent that the grounds included in clause (*b*) must

(1) (1909) 11 C. L. J. 45. (2) (1910) 11 C. L. J. 512.
(3) (1916) 23 C. L. J. 489.

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be of the same nature as the ground specified in clause (*a*). It is not suggested in the case before us that the suit was liable to fail by reason of some formal defect. Consequently, the reason assigned by the Subordinate Judge in support of his conclusion is erroneous.

The result is that this Rule is made absolute and the order of the Subordinate Judge discharged. The case will be remitted to him in order that the appeal may be reheard on the materials on the record. It will be open to the Subordinate Judge to proceed under Rule 27 of Order 41 of the Code if he is satisfied that the conditions which justify the production of additional evidence in a Court of appeal have been fulfilled in this case; and in this connection his attention may be drawn to the observations of the Judicial Committee in *Keswaji Issir* v. *G. I. P. Railway Coy* (1). The petitioners are entitled to their costs in this Court as also the costs of the hearing before the Subordinate Judge on the 22nd January, 1916. We assess the hearing-fee in this Court at one gold mohur.

A. T. M. *Rule made absolute.*

[There is a diversity of judicial opinion as regards the power of the appellate Court ordering a suit to be withdrawn. The Bombay and Madras High Courts answering it in the affirmative ; See I. L. R. 35 Bom. 264 ; 27 Mad. L. J. 244. The Allahabad High Court, on the other hand, held a contrary view : See I. L. R. 8 All. 82 ; 13 A. L. J. 444.—Ed.]

(1) (1907) L. R. 34 I. A. 105 ; I. L. R. 31 Bom 381 ; 6 C. L. J. 5.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

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RAJENDRA LAL SUR

v.

ATAL BIHARI SUR AND OTHERS *

Revision—Ex parte *order allowing withdrawal of suit—Notice to defendant, if necessary—Civil Procedure Code (Act V of 1908), Sec. 115, O. 23 R. 1—Acting with material irregularity—Government of India Act, 1915 (5 & 6 Geo. V. Ch. 61).*

* Civil Rule No. 276 of 1916, against the order of Babu Umes Chunder Chuckerbutty, Subordinate Judge of 24-Perganahs, dated the 13th January, 1916.

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A Judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard; this is an instance of the application of the maxim *audi alteram partem.*

Ajant v. *Christien* (1) referred to.

When the lower Court made an order allowing the plaintiff to withdraw his suit without giving notice to the defendant, it acted with material irregularity in the exercise of its jurisdiction within the meaning of section 115 of the Code of Civil Procedure.

Dictum of Mr. Justice Coxe in *Bansi Singh* v. *Kishun Lall* (2) not approved.

The High Court has jurisdiction under section 107 of the Government of India Act, 1915, to set aside an order of the lower Court, which cannot be supported, as it was passed without opportunity afforded to the defendant to contest the application for withdrawal made by the plaintiff.

Application for revision by the Defendant.

Suit for partition of joint property.

The material facts and arguments appear from the judgment.

Babus Provas Chunder Mitter and *Satindra Nath Mukherjee* for the Petitioner.

Babus Niranjan Roy Chowdhry, Khitis Chunder Chuckerbutty and *Bimala Charan Deb* for the Opposite Party.

The judgment of the Court was delivered by

June, 23.

MOOKERJEE, J.—We are invited in this Rule to set aside an order made under Rule 1 of Order 23 of the Code of Civil Procedure. The petitioner was a defendant in a suit for partition of joint property, and contested the claim, on the ground, amongst others, that the plaint was insufficiently stamped. An issue was raised upon this preliminary point, and, after various interlocutory orders, which need not be set out in detail for our present purpose, the Court decided on the 6th January 1916 to determine the question of court-fees thus raised. On the day following, witnesses were examined, arguments were heard and judgment was reserved. Six day's later, we find the following entry in the order-sheet: "Plaintiffs are permitted to withdraw and bring a new suit. In the special circumstances of the case, I make no order as to costs." What had happened was that on the 12th January, the plaintiffs presented an application to the Subordinate Judge under rule 1 of Order 23 of the Code of Civil Procedure. They alleged that the suit as constituted was defective for want of parties and that full relief could not be had, unless the suit was re-constituted. No notice of

(1) (1912) 17 C. W. N. 862. (2) (1913) I. L. R. 41 Calc. 632.

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this application was given to the defendants; but the Court proceeded to make the order set out above. The petitioner now prays that the order may be set aside, and his application is supported by some of the other defendants to the suit.

The plaintiffs contend that this Court has no jurisdiction to set aside the order of the Subordinate Judge and relies upon the dictum of Mr. Justice Coxe in the case of *Bansi Singh* v. *Kishun Lall Thakur* (1), that a case could not well be said to have been decided within the meaning of section 115, Civil Procedure Code, when the Court had not adjudicated on the merits but had merely permitted the withdrawal of the plaintiff from the suit. We observe however that Mr. Justice Digamber Chatterjee did not share the doubt expressed by Mr. Justice Coxe, as to the competency of this Court to interfere with an order improperly made under Order 23, rule 1. We may point out that instances are by no means rare, where the High Court has set aside orders improperly made under Order 23, rule 1, in the exercise of the powers vested in it by section 115 of the Code of Civil Procedure: *Kharda Co.* v. *Durga Charan* (2); *Mabulla* v. *Hemangini* (3); *Ram Krishna* v. *Ram Kripanidh* (4) or under section 25 of the Provincial Small Cause Courts Act: *Umesh* v. *Rakhal* (5); *Buratha Gunta* v. *Thurlapatti* (6). We feel no doubt whatever that in any view we have ample jurisdiction under section 107 of the Government of India Act 1915 to set aside the order of the Subordinate Judge, which cannot possibly be supported as it was passed without opportunity afforded to the defendants to contest the application for withdrawal made by the plaintiffs. It has been contended, however, on behalf of the plaintiffs that rule 1 of Order 23 of the Code of Civil Procedure does not specifically require that notice of such an application must be given to the opposite party. That is perfectly true. But as pointed out in the case of *Ajant Singh* v. *Christien Mal* (7), it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he had been afforded an opportunity to be heard; this is merely an instance of the application of the maxim *audi alteram partem.* In the present case the defendants have incurred costs to resist the claim of the plaintiffs. They have not had opportunity given to them by the

(1) (1913) I. L. R. 41 Calc. 632. (2) (1909) 11 C. L. J. 45.
(3) (1910) 11 C. L. J. 512. (4) (1912) 9 A. L. J. 358.
(5) (1911) 15 C. W. N. 666. (6) (1910) 9 M. L. T. 204.
(7) (1912) 17 C. W. N. 862.

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Subordinate Judge to contest the truth of the allegations made by the plaintiffs in their application for withdrawal from the suit. If they had notice of the application, they might well have appeared and contended that although the plaintiffs might be allowed to withdraw from the suit, they should not be permitted to harass the defendants with a fresh suit on the same cause of action. They might also have urged that even if an order were made in terms of the petition the defendants should be indemnified to the extent of the costs incurred by them. We are of opinion that the Subordinate Judge should not have made an *ex parte* order of this description and that he has acted with material irregularity in the exercise of his jurisdiction.

The result is that this Rule is made absolute, the order of the Subordinate Judge discharged and the case remitted to this Court below in order that the application of the plaintiffs may be heard in the presence of all the parties concerned. The petitioner is entitled to the costs of this Rule. We assess the hearing-fee at two gold mohurs.

A. T. M. *Rule made absolute.*

APPELLATE CIVIL.

Before Mr. Justice Teunon and Mr. Justice Sheepshanks.

RAM CHANDRA MISRA AND OTHERS

v.

GANESH CHANDRA GANGOPADHYA AND OTHERS.*

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*May, 30, 31
June, 30.*

Mogholi Brahmattar tenures—Underground rights, agreement to lease—Covenant of title—Subsequent judicial decisions throwing doubts on lessor's title—Change in the knowledge of law possessed by both parties—Mutual mistake—Contract, if valid—Indian Contract Act (IX of 1872), Sec. 20—Specific Relief Act (I of 1877) Sec. 36.

At the time when an agreement for transfer of underground rights in Mogholi Brahmattar lands was made, the parties believed that the rights of tenure-holders of such lands included all mineral rights. But before the completion of the contract certain judicial decisions threw grave doubts on the title of the Brahmattardars to the mineral rights. Upon a suit having been brought by the plaintiffs for refund of money paid as an advance on a lease thereafter to be executed, which, in fact, was not executed.

* Appeal from Original Decree, No. 518 of 1914, against the decree of Babu Jadav Chandra Bhattacharya, Additional Subordinate Judge of Burdwan, dated the 6th July, 1914.

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Held, that the contract entered into by the parties was void under section 20 of the Indian Contract Act, as having been entered into under a mutual mistake; and that the defendants having given the plaintiffs a covenant of title, the contract was also broken by their failure to shew a good title and to cure the defect therein; and that the plaintiffs were entitled to succeed.

Cooper v. *Phibbs* (1) relied on.

Soper v. *Arnold* (2), *Ellis* v. *Rogers* (3), *Best* v. *Hamand* (4), and *In re Haedicke and Lipski's Contract* (5) referred to.

Held further, that the suit not being one for rescission of a contract, section 36 of the Specific Relief Act did not apply to the case.

Suit for Money.

Appeal by the Defendants.

The material facts will appear sufficiently from the judgment.

Babus Dwarka Nath Chuckerbutty, Mohini Mohan Chatterjee, and *Suresh Chandra Das* for the Appellants.

Babus Mohendra Nath Roy, Surendra Nath Guha and *Binoyendra Nath Ganguli* for the Respondents.

C. A. V

The judgment of the Court was as follows:

June, 30.

The suit out of which this appeal arises was a suit for the refund of money paid as an advance on a lease thereafter to be executed which, in fact, was not executed. The circumstances, stated briefly, are as follows:—The plaintiffs were desirous to enter into coal mining operations and for that purpose to obtain the underground rights in 601 bighas of land in village Kaniapur. In this village defendants owned a three annas share. The plaintiffs had separately negotiated but without success with the co-sharers of the defendants for a transfer of their interest in this property. Upon the failure of this negotiation, the plaintiffs entered into an arrangement with the defendants that the latter should lease to them their own share and twelve and a half annas more belonging to their co-sharers and also should guarantee them for coal mining purposes the peaceful possession of the remaining half anna share.

A draft lease dated the 30th October, 1908 was drawn up embodying these terms, and a sum of Rs. 13,052 was paid on account by the plaintiffs to the defendants. Subsequently, certain other sums were also paid in furtherance of the transaction, making the amount paid by the plaintiffs a total sum of Rs. 14,032. The lease

(1) (1867) L. R. 2 H. L. 149. (2) (1887) 37 Ch. D. 96 (101).
(3) (1885) 29 Ch. D. 661 (666). (4) (1879) 12 Ch. D. 1.
(5) (1901) 2 Ch. D. 666.

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was never executed, and the plaintiffs sued to recover this sum with interest. The defendants contested the suit principally on the grounds that they had given the plaintiffs no covenant of title, that they were willing themselves to carry out the contract, and that it was not they but the plaintiffs who had made default in its performance, that the plaintiffs were not entitled to rescind the contract, and that for these reasons the defendants had incurred no liability. The learned Subordinate Judge has found against them on all these points, and he has held that the contract was void, that the defendants had expressly bound themselves to indemnify the plaintiffs for the sum of Rs. 13,052 received by them and that the defendants are also liable for the incidental expenses incurred by the plaintiffs in addition to this sum. He has, accordingly, decreed the plaintiffs' suit in full. Against this decision the defendants appeal.

On appeal, it is argued that the finding of the learned Subordinate Judge that there was a covenant of title is mistaken, and that he should have held that nothing but possession was granted, that the defendants have and always had the title to the land which they claimed to have when the contract was entered into, that the plaintiffs had as much knowledge of this title as the defendants, that the defendants are now and have always been ready to make over the land to them with this title, and thereby fulfil the contract as understood at the time it was made both by the plaintiffs and the defendants, that there has been no mis-representation, that the contract was accepted by the plaintiffs according to the law as then understood and that the plaintiffs cannot rescind it on account of any change which has since been made in the law. On these main grounds the appellants urge that the whole of the plaintiffs' claim should have been rejected. Apart from their main argument they urge that if the plaintiffs are entitled to recover any thing at all from the defendants they cannot claim to recover either a sum of Rs. 9,465 out of the total sum of Rs. 13,052 which was paid to the defendants not for any benefit of their own but merely as agents, or the incidental sum paid in addition to the sum of Rs. 13,052.

The main point to be considered is what rights were understood by the contracting parties to be contracted for at the time when the contract was made. The defendants and their co-sharers are Mogholi Brahmattardars of the land in question. It is common ground that at the time when this contract was made, that is to say, in October, 1908, it was generally believed that the rights of tenure-holders included all mineral rights. In July, 1909 and in May, 1910, the decision of the Privy Council in *Abhiram Goswami Mohant*

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v. *Shyam Charan Nandi* (1), and in *Kumar Hari Narayan Singh Deo* v. *Sriram Chakravarti* (2), threw doubts on this understanding of the law. After these decisions a certain amount of correspondence passed between the parties, which was brought to a head by a letter (Exhibit 3) from the plaintiffs' solicitors to the defendants demanding that defendants should produce for inspection of the plaintiffs all their documents of title relating to the property, and should satisfy them as to their title within two months, and stating that if this were not done, the plaintiffs would rescind the contract and claim a refund of the sums paid by them. To this letter the defendants replied that they had long ago satisfied the plaintiffs as to their title to the property, and that they held the plaintiffs to their contract. The solicitors replied, denying that the plaintiffs had ever been satisfied about the title of the defendants, and offering on behalf of the plaintiffs to complete the contract on the defendants satisfying the solicitors that they had a good and marketable title to the property. Nothing to this end was done by the defendants, and the result was the institution of the present suit.

The principal point relied on in appeal is that the contract to be executed was one regarding the Mogholi Brahmattar rights. The appellants say that they are willing to transfer these rights, that there is no defect in their title, that they were and are able and willing to transfer these rights, with everything which they include, and that all that the plaintiffs have to complain of is that under the law, as now understood, this title may not be held to pass the rights to minerals. They argue in effect that the rights to minerals are something incidental to the main contract, and that if they transfer their title to the Mogholi Brahmattar rights, it is immaterial whether or not these rights are found to include the rights to minerals. This contention is disposed of at once by a glance at the draft leases dated 30th of October, 1908 (Exhibit 1) which is one of the two principal documents from which the actual agreement between the parties is to be gathered. The whole of this document is directed towards a transfer of the under-ground rights in the land in question. Those rights are specifically referred to in practically every paragraph, and the document makes it perfectly clear that the entire purpose of the agreement was to enable the plaintiffs to work coal under-ground. That everything except the right to work coal was considered immaterial is clear from the fact that under the draft agreement

(1) (1909) I. L. R. 36 Calc. 1003; 10 C. L. J. 284.
(2) (1910) 14 C. W. N. 746.

surface lands were only to be settled with the plaintiffs to such an extent as would be required for the actual working of the coal underneath them. This being so, it is impossible to maintain the contention that the contract as understood between the parties was merely to transfer the Mogholi Brahmattar rights, and that the question whether those rights did or did not include the rights to minerals was considered a mere incident. It is, on the contrary, perfectly evident that the purpose of the contract was to transfer the mineral rights, and that if those rights cannot now be transferred, the agreement cannot be carried out.

No person of common prudence, when about to enter into such an undertaking as the opening of a coal mining enterprise, would do so without making certain that he was buying, not an expensive and doubtful litigation, but an undisputed right to minerals. The circumstances, therefore, in which the contract was made lead us to the same conclusion as the wording of the contract itself.

Next, there is the argument of the appellants that what the defendants contracted to give was not a covenant for title but merely a covenant for undisturbed possession. The point which they desire to establish is that it lay on the plaintiffs not to seek to declare the contract void, but to carry it out and accept whatever title the defendants were able to give them, relying thereafter on the remedy which the contract would give in case their possession should be disturbed. In the first place it is, for the reasons stated in connection with the argument last dealt with, impossible to suppose that any prudent man would make a contract of this kind. In the second place, the agreement as set forth in the draft lease of the 30th of October, 1908 directly negatives this contention. The opening portion of the lease recites that defendants are in possession of the property referred to in respect of the under-ground right together with the necessary surface lands. Para. 5 of the draft lease provides that if the title of the plaintiffs is jeopardised owing to any weakness of title in the property mentioned in the potta, or by virtue of dispossession by others, or by discovery of any fraud in the title, the defendants and their representatives-in-interest shall be bound to make good any loss and costs incurred by the plaintiffs thereby. Further para 8 of the draft lease recites that the defendants lease out the property to the plaintiffs in an unencumbered and flawless state. This is a very clear covenant of title, and it is impossible to accept the appellants' argument on this point.

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The next argument on behalf of the appellants is that they are prepared to carry out the contract as understood by both parties, at the time it was made; and that if there has been any change in the law in consequence of which that property represents a lesser right than it did at the time when the contract was made, the contract is not affected thereby. As to this, it is sufficient to observe that there has been no change in the law. The change which there has been is in the knowledge of the law possessed by both parties. The appellants refer to the following cases: *Soper* v. *Arnold* (1); *Ellis* v. *Rogers* (2); *Best* v. *Hamand* (3), and *In re Haedicke and Lipski's Contract* (4). None of these cases lends any support to appellants' contention. The first of them is directly against it, for its application to the present case lies in the hypothetical case stated at page 100, according to which a person who contracts to purchase property and subsequently finds that his vendor has no title is entitled to refuse to complete and to have his deposit returned. The passage referred to in *Ellis* v. *Rogers* (2) lays down that where the contract does not expressly provide that there should be a good title, the knowledge of the purchaser before the contract that there was a defect which the vendor was unable to remove, prevents his raising an objection on that ground.

In the present case the contract does expressly provide that there should be a good title, and the purchaser had no knowledge before the contract of any defect in his vendor's title.

In *Best* v. *Hamand* (3) there was an express agreement that the purchaser was to be content with a mere conveyance of such title as the vendor had. There is no such agreement in the present case.

In *In re Haedicke & Lipski's Contract* (4) the question was whether the purchaser was precluded from challenging his vendors' title by words in the contract purporting to accept it, and the answer given to this question was in the negative.

The law in a case such as in the present one has been perfectly clear since the case of *Cooper* v. *Phibbs* (5). It is there stated that "Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."

This is what has happened in the present case. Both parties at the time when the agreement was made believed that Mogholi

(1) (1887) 37 Ch. D. 96 (101). (2) (1885) 29 Ch. D. 661 (666).
(3) (1879) 12 Ch. D. 1. (4) (1901) 2 Ch. D. 666.
(5) (1867) L. R. 2 H. L. 149.

Brahmattar rights carried with them mineral rights. But the decision of their Lordships of the Privy Council in *Kumar Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1), and the decision of this Court in *Raja Joti Prosad Singh Deo* v. *George Mathew Darby* (2) which we understand is now before their Lordships, at least throw very grave doubts on the title of the Brahmattardar to the mineral rights, and the mistake having thus been discovered the agreement cannot stand.

The next argument of the appellants is that this contract cannot be rescinded, because owing to the engagements which the defendants had entered into with other parties, the parties cannot be restored to the position which they occupied at the time when the contract was made. They refer on this point to section 36 of the Specific Relief Act. The Subordinate Judge has dealt rightly with this point. As he observes, the present suit is not for rescission of a contract but for recovery of money advanced, and the plaintiffs' claim is not affected by the section which is referred to. On all the main issues of the case the findings and reasonings of the learned Subordinate Judge are clearly right. The contract entered into by the parties is void under section 20 of the Indian Contract Act, as having been entered into under a mutual mistake. It has also been broken by defendants by their failure to show a good title and to cure the defect therein. The plaintiffs, therefore, have rightly been held entitled to succeed.

The next point to be considered is the extent to which the plaintiffs are entitled to recover from the defendants. The main point which the appellants argue relates to the sum of Rs. 9,465 which is stated to have been paid by the defendants to their co-sharers on account of the acquisition by defendants of the co-sharers' shares in the property. It is argued that this sum was not paid by the plaintiffs by way of any benefit to the defendants but that the defendants received it merely as *benamdars* or agents for the plaintiffs, that defendants having derived no benefit from it cannot be called upon to refund it, and that to compel them to do so would be a great hardship and injustice. When the correspondence connected with this part of the argument is examined, it will be seen that this argument cannot be accepted. It is clear that the defendants in dealing with this sum acted as principals, with the prospect of obtaining very substantial benefits for themselves and that it is not a case of agency, still less one of *benami*. Under

(1) (1910) 14 C. W. N. 746. (2) (1911) 16 C. W. N. 241.

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the agreement if the contract went through successfully the defendants stood to gain a sum in cash down of Rs. 5,400 and an annual benefit by way of royalties of Rs. 300. This in itself makes it clear that they undertook an adventure of their own, having an expectation of making a substantial profit, and taking, of course, corresponding risks. Even if this had not been so, they are, as the learned Subordinate Judge observes, concluded on this point by the specific agreement contained in the receipt, dated the 13th October, 1908. There can, therefore, be no question that defendants are liable to the plaintiffs for the principal amount of Rs. 13,052.

In addition to this sum the learned Subordinate Judge has held them liable for an amount of Rs. 980. This sum is made up of Rs. 500 paid by the plaintiffs with the knowledge and consent of the defendants to the employees of defendants and their co-sharers as a *douceur* for not obstructing the carrying through of the contract, Rs. 280 for the purchase of stamps and Rs. 200 as costs for taking out certificates for the minor co-sharers. The reason given by the learned Subordinate Judge for decreeing this portion of the claim are not conclusive. These sums were expended by the plaintiff through his agent Abinash Chandra Chatterjee, they were not paid to or at the instance of the defendants, and we cannot agree with the Subordinate Judge in holding that there was any agreement that they should be treated as part of the *selami*, or that on failure of the negotiations the defendants should repay.

The result is that the principal sum decreed by the learned Subordinate Judge will be reduced by Rs. 980. As regards the remainder of the claim, the appeal is dismissed. Costs in proportion to the result.

Respondents in cross-appeal urge that interest should have been allowed up to the date of the decree. This argument is a reasonable one, and interest will be decreed accordingly, with interest at 6 per cent. on the aggregate sum so adjudged and on costs, to the date of payment. The cross appeal is thus decreed with costs.

A. N. R. C. *Decree varied.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

MAHARAJA BIRENDRA KISORE MANIKYA BAHADUR

v.

FULJAN BIBI AND OTHERS.*

CIVIL.

1917.

February, 12.

Estoppel—Contract, variation of—Persistence for a long period—Assertion that term different.

While a contract of tenancy is in force, either party cannot practically obtain a variation thereof, by persisting for a long period in his assertion that the term is otherwise than what it really is.

Appeal by the plaintiff.

Suit for assessment of rent.

The material facts and arguments appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Romes Chunder Sen* for the Appellant.

Babu Dhirendra Lal Kastgir for the Respondents.

The Judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiff in a suit for assessment of rent. *February, 12.*

The case for the plaintiff is that the lands in dispute are included in a tenancy created on the 25th August, 1849, that rent has not hitherto been assessed for these lands, and that the defendant is not entitled to hold the lands without payment of rent.

The defence in substance is that under the terms of the contract between the parties the defendant is entitled to hold these lands without payment of rent, and that the lands were exempted from payment of rent on consideration that the tenant would bring under cultivation the other lands included in the lease.

In 1895, proceedings were taken under Chapter X of the Bengal Tenancy Act for preparation of a Record of Rights and the tenant then claimed to be entitled to hold these lands without payment of rent. His contention, however, was over-ruled, and an entry was made in the Record of Rights to the effect that the lands were included in the lease and were not, under the contract specially exempted from payment of rent.

* Appeal from Appellate Decree No. 585 of 1916, against the decree of A. H. Cuming Esq., District Judge of Tipperah, dated the 13th December, 1911, reversing that of Mr. Iradatulla, Munsiff of Comilla, dated the 15th December, 1910.

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The present suit was instituted by the landlord on the 4th October, 1909, for assessment of rent.

The District Judge has held, in concurrence with the Court of first instance that the allegation of the defendant that he was entitled to hold these lands without payment of rent for the consideration that he would bring under cultivation the other lands included in the lease had not been established. But, while the primary Court over-ruled the plea of limitation on the authority of the decisions in *Beni Pershad* v. *Dudhnath* (1), and *Seshamma* v. *Chickaya* (2), the lower appellate Court has dismissed the suit as barred by limitation, inasmuch as more than twelve years before its institution the tenant had, to the knowledge of his landlord, denied his liability to pay rent in respect of these lands. We are of opinion that this view cannot possibly be supported.

The defendant, no doubt, asserted before the settlement authorities, that under the terms of the contract between the parties he was entitled to hold these lands without payment of rent; that case, however, failed. He now seeks to succeed on the ground that as he has denied his liability to pay rent for more than twelve years, he has thereby secured a variation of the terms of the contract between him and his landlord. Neither authority nor principle has been invoked in support of this position. It is indeed, a novel proposition that while a contract of tenancy is in force, either party can practically obtain a variation thereof, if he persists long enough in his assertion that one of the terms is otherwise than what it really is. The decisions in *Maharaja Birendra Kisore* v. *Lakshmi* (3), and *Kali Mohan* v. *Birendra Kisore* (4) lend no support to the contention of the respondent which is clearly negatived by the cases relied upon by the Court of first instance.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and before the lower appellate Court.

A. T. M. *Appeal allowed.*

(1) (1899) I. L. R. 27 Calc. 156.
(2) (1902) I. L. R. 25 Mad. 507.
(3) (1913) 22 C. L. J. 129.
(4) (1914) 22 C. L. J. 309.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

BHASAI AND OTHERS

v.

AMINUDDI AND OTHERS.*

CIVIL.

1916.

December, 7, 8, 12.

Suit for additional rent for area under cultivation—Kabuliat, suit on—Co-sharers—Co-sharer landlord, suit by, other co-sharer being added as a party defendant—Suit, maintainability of—Bengal Tenancy Act (VIII of 1885), Secs. 52, 188.

A Kabuliat provided that the tenant should enjoy the land rent-free for a certain period, and that thereafter he should pay rent at a certain rate per bigha fixed in perpetuity for as much land as was cleared and brought under cultivation. It further provided that the whole area was to be assessed with rent at that fixed rate on the lands being reclaimed or in the event of the surrounding lands being brought under cultivation. The tenant was for sometime paying rent for lands which had previously been brought under cultivation. A suit for rent for the entire area having been brought by some of the co-sharer landlords on the happening of the contingency mentioned in the Kabuliat, the remaining co-sharer having been made a *proforma* defendant on the ground that he refused to join with the plaintiffs in the suit :

Held, that the suit was not one for additional rent for excess area under section 52 of the Bengal Tenancy Act, and the provisions of section 188 of the Act were not applicable to the case, and that it was maintainable by the plaintiffs upon the Kabuliat under the general law.

Raja Pramada Nath Roy v. *Raja Ramani Kanta Roy* (1) and *Ram Chunder Chuckrabutty* v. *Giridhur Dutt* (2) followed.

Dwarka Dhabai v. *Mathur Lal Majumdar* (3) distinguished.

Appeal by the Plaintiffs.

Suit for rent.

The material facts will appear sufficiently from the judgment.

Babu Probodh Chunder Chatterjee (for *Babu Manmatha Nath Mukherjee*) and *Babu Panna Lal Chatterjee* for the Appellants.

Babu Gunada Charan Sen for the Respondents.

C. A. V.

The judgment of the Court was as follows :

December, 12.

The plaintiffs appellants as the owners of a $\frac{5}{8}$th share of a Mirash tenure sued to recover rent of a howla (subordinate to the

* Appeal from Appellate Decree No. 1206 of 1915, against the decree of P. E. Cammiade Esq., District Judge of Buckergunj, dated the 5th March, 1915, reversing that of Babu Gopeswar Banerjee, Munsiff at Perozepur, dated the 11th June, 1914.

(1) (1907) I. L. R. 35 Calc. 331 ; 7 C. L. J. 139.

(2) (1891) I. L. R. 19 Calc. 755.

(3) (1913) 18 C. W. N. 942.

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Mirash) held by the principal defendants, the owner of the remaining 1/4th share of the Mirash being made a *proforma* defendant on the ground that she refused to join with the plaintiffs in the suit. The suit was based upon a kabuliat which described the land let out as 50 bighas "by guess" and provided that the lessees should enjoy the land rent free for 2 years and that thereafter they should pay rent at the rate of Rs. 2 per bigha fixed in perpetuity for as much land as was cleared and brought under cultivation. No period was fixed within which the land should be reclaimed, but it was provided that if the surrounding lands were all brought under cultivation the executants would be liable to pay rent for the entire area in their possession at the stipulated rate.

The area of the land comprised in the howla was found to be 83 bighas in the record of rights, and it was also found that all the surrounding lands with the exception of a small patch of land reserved as pasture land had been brought under cultivation.

The plaintiffs stated that they were unable to ascertain whether any rent was due to the *proforma* defendant and claimed their share of the rent of the entire land. They also prayed that the proforma defendant might be joined as plaintiff if she desired to do so, and a decree might be passed for the entire rent if it was found that the rent due to her was left unpaid, on taking additional Court-fee from the plaintiffs. The Court of first instance passed a decree in favour of the plaintiffs, but on appeal that decree was reversed by the District Judge. The plaintiffs have appealed to this Court.

The main ground upon which the learned District Judge dismissed the suit viz, that under section 45 of the Contract Act the plaintiffs alone could not maintain the suit upon the joint contract contained in the Kabulyat, cannot be sustained. As pointed out in *Shital Chandra Bairagi* v *Manick Chandra Hazra* (1), although as a general rule all co-contractees ought to be joined as plaintiffs, a suit by one would not be bad if the others were joined as defendants and if there was good reason for not joining them as plaintiffs, and that one of several joint contractees may sue to enforce his share of the obligation if the other co-contractees are joined as defendants. In the present case the remaining co-sharer who it is found refused to join as plaintiff was made a proforma defendant to the suit. The learned pleader for the respondent also did not attempt to support the judgment on that ground.

(1) (1909) 9 C. L. J. 331.

It cannot be disputed that the plaintiffs can maintain a suit under the general law to recover the entire rent of the tenure provided they make their co-sharer a party to the suit [see *Raja Pramada Nath Roy* v. *Raja Ramani Kanta Roy* (1)], but it is contended on behalf of the respondents that this is a suit for additional rent for additional area under the provisions of section 52 of the Bengal Tenancy Act: and that therefore the suit cannot be maintained unless all the landlords join as plaintiffs in bringing the suit. If the suit is one under section 52 of the Bengal Tenancy Act the provisions of section 188 of the Bengal Tenancy Act would apply, and in that case, the suit cannot upon the authorities be maintained by some of the co-sharer landlords [see *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (2), and *Sati Prosad Garga* v. *Radha Nath Maity* (3)].

The question therefore is whether the suit is one under section 52 of the Bengal Tenancy Act. Now, the land at the time it was let out was waste and jungly. It was apparently not measured and the area was stated to be 50 bighas "by guess." The Kabulyat as stated above provided that the tenants would pay rent on the entire area at the fixed rate of Rs. 2 per bigha, when the lands would be reclaimed or when the surrounding lands would be brought under cultivation. The rent claimed under that contract therefore is not additional rent for excess land within the meaning of section 52 of the Bengal Tenancy Act, but a claim for rent in accordance with the terms of the original letting. The present case is similar to that of *Ram Chunder Chuckrabutty* v. *Giridhur Dutt* (4), where Pigot and Banerji, JJ. held that such a suit is not a suit for additional rent for excess land within the meaning of the Bengal Tenancy Act, and that "there is no reason why he should not be entitled to claim separately the rent that is payable, not upon any fresh adjustment of the rent inconsistent with the continuance of the old tenancy, but upon an ascertainment of the rent payable in accordance with the terms of the original letting." The case is sought to be distinguished on the ground that the plaintiff in that case was in separate collection of his share of the rent. That fact, however, is immaterial where the suit is not one for additional rent for excess area under section 52 of the Act, but is a suit brought by a co-sharer landlord under the general law after making all the co-sharers parties to the suit.

(1) (1907) I. L. R. 35 Calc. 331; 7 C. L. J. 139.
(2) (1890) I. L. R. 17 Calc. 695.
(3) (1912) 16 C. L. J. 427.
(4) (1891) I. L. R. 19 Calc. 755.

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The learned Pleader for the respondents relies strongly on the case of *Dwarka Dhakai* v. *Mathur Lal Majumdar* (1), in which Coxe and Roy JJ. held that a suit for additional rent on the basis of a Kabulyat executed by the tenant in favour of the entire body of landlords agreeing to pay additional rent for additional area, was not maintainable by a co-sharer landlord although the other co-sharers are made parties to the suit. But that case is clearly distinguishable from the present. There the tenants had executed a Kabuliat agreeing to pay rent for 15 bighas of land, and there was a stipulation that the tenant would pay additional rent for additional land. The land on being measured was found to be 25 bighas and the suit was for the whole rent including the rent due on the additional area. That was therefore a suit for additional rent for excess area under section 52 of the Bengal Tenancy Act and the decision in that case cannot apply to the present. The learned Judges pointed out that the existence of an agreement (Kabulyat) does not necessarily take the suit out of the Tenancy Act. It is not however the existence of the Kabulyat but the fact that the whole area was by the terms of the Kabuliat to be assessed with rent at a fixed rate on the lands being reclaimed or in the event of the surrounding lands being brought under cultivation, shows that the suit is not one for additional rent for excess area. There is no question in the present case of any excess area or of adjustment of rent inconsistent with the terms of the original tenancy. The rate of rent was fixed for the whole area at the inception of the tenancy and the tenant agreed to pay the rent for the entire land on the happening of the contingency mentioned in the Kabulyat. The tenant was paying rent for lands which had previously been brought under cultivation, and under the terms of the original letting he was liable to pay rent for the entire area under the circumstances found in the case.

The suit therefore is maintainable by the plaintiffs upon the Kabuliat under the general law, and the provisions of section 188 are not applicable to the suit. No other question appears to have been urged before the Court below.

The decree of the Court of Appeal below must therefore be set aside and that of the Court of First Instance restored with costs in both Courts.

A. N. R. C. *Appeal allowed.*

(1) (1913) 18 C. W. N. 942.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

SATIS CHANDRA BOSE

v.

TAKURDAS MANDAL AND OTHERS.*

CIVIL. 1916. *June, 22.*

Remand—Evidence, insufficient and unsatisfactory—Civil Procedure Code (Act V of 1908), O. 41, Rr. 23, 27—Appellate Court, when can order production of documents or examine witnesses—' Substantial cause.'

It is not competent for the lower appellate Court to set aside a decision of the trial Court in favour of the plaintiff on the ground that the evidence adduced by the defendants in support of their plea was not sufficient and satisfactory.

Where the mind of the Judge is in such a condition that the evidence on the record does not enable him to pronounce judgment upon the matter in controversy before him, he can under rule 27 of order 41 of the Code of Civil Procedure, require a document to be produced or any witness to be examined.

Ambuja v. *Appadurai* (1) followed.

The Court of appeal may, for substantial cause, allow additional evidence to be adduced. A ' substantial cause' does not include a case where the only ground assigned is that the evidence already adduced by the aggrieved party, is not satisfactory and sufficient. The expression ' any other substantial cause' in O. 41 R. 27 of the Code of Civil Procedure leaves a wide discretion to the appellate Court to admit additional evidence, but the retrial of a case at the instance of a party who has been defeated and justly defeated, because his evidence is insufficient and unsatisfactory, is not necessary for the ends of justice.

Appeals by the plaintiff.

Suit by a landlord for enhancement of rent on the ground of a rise in the price of staple food crops.

The material facts and arguments appear from the judgment.

Babu Surendra Madhab Mallik (*for Babu Pronas Chunder Mitter*) for the Appellant.

None for the Respondent.

The judgment of the Court was delivered by

Mookerjee J. This is an appeal by the plaintiff landlord in a suit instituted by him for enhancement of rent on the ground of a rise in the price of staple food crops. The defendants pleaded that their rent was fixed in perpetuity and was not liable to be enhanced.

June, 22.

* Appeals from Order Nos. 602 of 1914 and 14 and 15 of 1915, against the orders of Babu Binode Behary Mitter, Subordinate Judge of 24 Perganas, dated the 18th September 1914, reversing the decree of Babu Rajendra Lal Sadhu, Munsiff of Baruipur, dated the 22nd September, 1913.

(1) (1912) I. L. R. 37 Mad. 414.

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This they sought to establish by proof that they had paid rent at a uniform rate for upwards of 20 years. The trial Court found that this allegation was not established and made a decree for enhancement of rent. On appeal, the Subordinate Judge has, by judgment which we are constrained to characterise as extraordinary, set aside this decision and remanded the suit for retrial. He has come to the conclusion that the evidence adduced by the defendants to prove payment of rent at a uniform rate for upwards of 20 years prior to the institution of the suit is not satisfactory and sufficient; yet he holds that "it will be conducive to the interest of both the parties if the case is remanded to the Court of first instance for trial *de novo* where both the parties will be at liberty to adduce fresh evidence." The Subordinate Judge has overlooked that the procedure adopted by him is not sanctioned by the Civil Procedure Code.

In the first place, it was not competent to him to set aside the decision of the trial Court in favour of the plaintiff on the ground that the evidence adduced by the defendants in support of their plea was not sufficient and satisfactory. Rule 23 of Order 41 of the Code authorises a Court of appeal to reverse the decree of the primary Court and to remand the case for retrial, when the suit has been erroneously disposed of upon a preliminary point. Here the suit had been decided on the merits by the trial Court; consequently Rule 23 was clearly inapplicable.

In the second place it is plain that the defendants were not entitled to adduce additional evidence, as no case had been made out for the reception of such evidence under Rule 27 of Order 41 of the Code. That rule entitles a party to an appeal to produce additional evidence, whether oral or documentary, if certain specified conditions are fulfilled. One of these contingencies is that the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; but there is no allegation that the trial Court in the present case had refused to admit evidence tendered by the defendants. Another possible contingency is where the appellate Court requires a document or a witness to be examined to enable it to pronounce judgment. The present case is obviously not of that description. As observed in *Ambuja Ammal* v. *Appadurai Mudali* (1), this can be properly predicted of a case where the mind of the Judge is in such a condition that the evidence in the record does not enable him to pronounce judgment, upon the matter in controversy before him.

(1) (1912) I. L. R. 38 Mad. 414.

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But, here the Subordinate Judge came to the conclusion that the evidence adduced by the defendant was not satisfactory and sufficient to show that the rent had been paid at a uniform rate for 20 years prior to the institution of the suit. This conclusion would lead forthwith to a decision adverse to the defendants. The third possible contingency is that for substantial cause the Court of appeal may allow additional evidence to be adduced. We need not attempt to define the expression "substantial cause" which has been left undefined by the legislature; but it is plain that a substantial cause, whatever it may denote, does not include a case where the only ground assigned is that the evidence already adduced by the aggrieved party is not satisfactory and sufficient. If the view taken by the Subordinate Judge were to prevail, the result would follow that every unsuccessful litigant would be entitled to claim a remand with a view to adduce additional evidence and have a chance of retrial. No doubt the expression 'any other substantial cause' leaves a wide discretion to the appellate Court to admit additional evidence; but the retrial of a case at the instance of a party who has been defeated and justly defeated because his evidence is insufficient and unsatisfactory, is not necessary for the ends of justice. We may, in this connection, refer to the observations of the Judicial Committee in *Kessowji Issur* v. *G. I. P. Railway Coy.* (1), as to the great caution with which additional evidence is to be received in an appellate Court—evidence which has not been produced in the Court of first instance. We are clearly of opinion that the course adopted by the Court below in this appeal is entirely wrong and its order cannot be supported.

The result is that this appeal is allowed, the order of the Court below discharged and the decree of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

This judgment will govern the other two appeals (M. A. Nos. 14 and 15 of 1915) in which similar orders will be drawn up.

A. T. M. *Appeals allowed.*

(1) (1907) I. L. R. 31 Bom. 381; 6 C. L. J. 5.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

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August, 16.

BIJOY KUMAR ADDY

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Compensation—Land, acquisition of—Acquisition, principle of.

When land is acquired under the provisions of the Land Acquisition Act, compensation must be awarded in respect thereof. The acquisition is made on the assumption that there is an interest to be acquired and paid for; it is beyond the competence of the Collector and the Special Judge to hold that there is no interest which can be acquired for which compensation is payable.

Raghunath v. *Collector of Dacca* (1) referred to.

Although the sovereign power of every state is competent to appropriate for purposes of public utility, lands situate within the limits of its jurisdiction, yet it is not deemed politic to exercise this authority so as to interfere with security in the enjoyment of private property or to confiscate private property for public purposes without paying the owner its fair value.

Appeal by the claimant.

Award under section 26 of the Land Acquisition Act.

The material facts and arguments appear from the judgment.

Babus Mohendra Nath Ray and *Anilendra Nath Ray Chowdhury* for the Appellant.

Babu Ram Churn Mitra for the Respondent.

The judgment of the Court was delivered by.

August, 16.

Mookerjee, J.—This appeal is directed against what purports to be an award under section 26 of the Land Acquisition Act. The claimant, who is the appellant in this Court, was at the time of the declaration under section 6 of the Land Acquisition Act, lessee of the land under Government. On the 26th February, 1890, his predecessor had executed a kabulyat in favour of the Collector and had agreed to pay annually Rs. 176-2-2 in respect of the land granted to him. The rent was payable into the treasury on the 28th March each year, and, the kabulyat provided that on default to pay the rent, "the arrears would be realised by the Sarkar in accordance with law." On the 25th November, 1891, the lessee made an addition to the kabulyat in the following terms: "In accordance with the order of the Collector, dated the 10th August, 1891, I

* Appeal from Original Decree No. 466 of 1915, against the decision of H. P. Duval Esq., Land Acquisition Judge of 24-Perganahs, dated the 3rd July, 1915.

(1) (1910) 11 C. L. J. 612.

undertake to give up the land without compensation if the Sarkar requires it." Since, then, the lessee and his representatives in interest have been in occupation of the land. On the 5th May, 1914, a declaration was made, which was published in the Calcutta Gazette on the day following, that the land was to be acquired for the purposes of a road in continuation of Kali Temple Road westward to the Tully's Nullah. On the 28th July, 1914, an amended declaration was made that the land was required for the purposes of the road, a dispensary and a garden. The Collector, when he made his award in due course, did not, however, assess compensation for the land. The reason he assigned in support of the course adopted is best stated in his own words: 'The present holders of the land have permanent interest in it, but there is a condition in the kabulyat that in the event of the land being required by Government, the holder must relinquish it without receiving any compensation. As the land is now required by the Government for a public purpose, no compensation is awarded for the land." At the instance of the claimant a reference was then made to the civil Court under section 18. The Special Judge has accepted the view of the Collector that no compensation need be awarded for the land and has framed his award accordingly. Before the Special Judge the contention appears to have been advanced that the land was required, not by Government for its own purpose but to be made over to the Calcutta Municipal Corporation who intended to establish thereon a charitable dispensary with funds placed at their disposal by a public-spirited citizen. The Special Judge came to the conclusion that even if these facts were established, it made no difference in the position of the claimant and that the land could be compulsorily acquired under the Land Acquisition Act without the assessment of any compensation therefor.

On the present appeal the claimant has contended that this view is erroneous, and that it is obligatory upon the Collector as also upon the Special Judge to provide for compensation for all lands acquired under the Land Acquisition Act. In connection with this question our attention has been drawn to the divergence of judicial opinion on the question of the extent of the interest in the land which can be acquired under the Land Acquisition Act. It was held by this Court in *Babujan* v. *Secretary of State for India* (1), and *Raja Shyam Chandra* v. *Secretary of State for India in Council* (2), that when land is acquired under the Land Acquisition Act,

(1) (1906) 4 C. L. J. 256.
(2) (1908) 7 C. L. J. 445; I. L. R. 35 Calc 525.

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the entire aggregate of rights inherent therein must be acquired. On the other hand, it was held by the Bombay High Court in *The Government of Bombay* v. *Esufali* (1), that the entire aggregate of rights in the land need not be acquired and that if land is held under the crown by tenants, their subordinate interest alone may be acquired under the Land Acquisition Act: [See also *Imdad Ali* v. *Collector of Farakhabad* (2); *Crown Brewery* v. *Collector of Dehra Dun* (3). It is not necessary for our present purpose to determine which of these conflicting views gives effect to the true intention of the Legislature, because in the case before us, proceedings have been taken for the acquisition of the entire interest in the land in conformity with exposition of the law on the subject, uniformly adopted in this Court. The real question in controversy is, whether land can be acquired compulsorily under the Land Acquisition Act without the assessment of compensation therefor.

It is perfectly plain upon the provisions of the Land Acquisition Act that when land is acquired thereunder, compensation must be awarded. Section 9 provides that the Collector, when he makes his award, shall state the amount of compensation for the land acquired. When a reference is made at the instance of the claimant to the civil Court, section 18 lays down that reference may be demanded because the claimant objects to the amount of compensation assessed by the Collector. Section 23 provides that the civil Court, when it hears a reference, shall determine the amount of compensation to be awarded for the land and amongst other matters provides that the Court shall take into consideration the market value of the land at the date of the publication under section 6. Finally section 26 provides that every award made by the Judge shall specify the amount awarded under clause (c) of sub-section (1) of section 23. These sections make it plain beyond controversy that if land is acquired under the provisions of the Land Acquisition Act, compensation must be awarded in respect thereof. The acquisition is made on the assumption that there is an interest to be acquired and paid for; it is beyond the competence of the Collector and the Special Judge to hold that there is no interest which can be acquired or for which compensation is payable: *Raghunath* v. *Collector of Dacca* (4), where the decisions in *Shyam Chandra* v. *Secretary of State* (5), and *Gajendra* v. *Secretary of State* (6), are explained.

(1) (1909) I. L. R. 34 Bom. 618.
(2) (1885) I. L. R. 7 All. 817.
(3) (1897) I. L. R. 19 All. 339.
(4) (1910) 11 C. L. J. 612.
(5) (1908) 7 C. L. J. 445; I. L. R. 35 Calc. 525.
(6) (1908) 8 C. L. J. 39.

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This is in accordance with what is well-understood to be the fundamental principle when lands are compulsorily acquired, namely, that although the sovereign power of every state is competent to appropriate, for purposes of public utility, lands situate within the limits of its jurisdiction, yet it is not deemed politic to exercise this authority so as to interfere with security in the enjoyment of private property or to confiscate private property for public purposes without paying the owner its fair value. This doctrine was applied by the House of Lords in *River Weir Commissioner* v. *Adamson* (1), and by the Judicial Committee in *Western Railway Co.* v. *Windsor Railway Co.* (2), and *Commissioner of Public Wards* v. *Logan* (3).

In the case before us, there is thus no valid award either by the Judge or by the Collector. Whatever the rights of the claimant may be, his land must be assessed and compensation must be awarded under the provisions of section 23 read with section 26. When such compensation has been assessed and awarded, a question of apportionment may arise and will in the present case necessarily arise between the Government on the one hand and the claimant on the other. Whatever may be the true measure of the rights of the claimant as a tenant under the Government at the date of the declaration, the Government was undoubtedly in the position of landlord and would be entitled to a share at least of the compensation money awarded for the aggregate of the right in the land. It is not necessary at this stage to determine, on what basis the apportionment should be effected; that question will arise only after compensation has been assessed.

The result is that this appeal is allowed, the decree of the Special Judge set aside and the case remitted to the Collector in order that he may make a proper award after determining the compensation payable in respect of the land acquired. The appellant is entitled to his costs both here and in the Court below.

Under section 13 of the Court Fees Act we direct that the amount of Court-fees paid by the appellant upon the memorandum of appeal be returned to him.

A. T. M. *Appeal allowed: Case remitted.*

(1) (1877) 2 App. Cas. 743. (2) (1882) 7 App. Cas. 178.
(3) (1903) App. Cas. 355.

Before Mr. Justice D. Chatterjee and Mr. Justice Newbould.

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January, 30.

ZAMIR MUNSHI

v.

BISSESWARI DEBYA CHOWDHURAIN AND OTHERS.*

Ejectment—Sale of portion of non-transferable occupancy holding—Surrender of portion sold—Taking new settlement of the remainder—Bengal Tenancy Act (VIII of 1885), Sec. 86—'Incumbrance.'

Per D. Chatterjee, J.: A raiyat having sold a part of his occupancy holding cannot surrender the self-same part to his landlord so as to entitle the landlord to take *khas* possession of the said part by ejecting the purchaser.

Tomizuddin v. *Khoda Nawaz* (1) and *Ramoni* v. *Kalimuddi* (2) dissented from.

Per Newbould, J: Taking of a new settlement of the remainder of a holding after expressly surrendering the part sold, operates in law as an implied surrender of the remaining portion.

Sub-section (5) of section 86 of the Bengal Tenancy Act is no bar to a landlord making a fresh settlement with the original tenant after his surrender. Even if the agreement to make a re-settlement was entered into before the surrender, this, in the absence of collusion, would not make the surrender invalid. There is nothing in law to prevent a surrender being made subject to conditions.

(D. Chatterjee, J. expressing no opinion). A sale of a portion of a non-transferable occupancy holding is not an incumbrance within the meaning of section 86 (6) of the Bengal Tenancy Act.

Tomizuddin v. *Khoda Nawaz* (1) and *Ramoni* v. *Kalimuddi* (2) followed. *Hussain Bibi* v. *Mohammed* (3) and *Raghunath* v. *Cox* (4) distinguished.

Clause 7 of section 86 of the Bengal Tenancy Act provides for a valid surrender of a part of the holding.

Per D. Chatterjee, J: A tenant has no right to give up or resign or yield what he has already sold. Section 86 (5) of the Bengal Tenancy Act, even if it could apply to part surrender, would not entitle the landlord to take *khas* possession.

Appeal by the Defendant.

Suit for ejectment.

The mateiral facts and arguments appear from the judgment.

Babu Bimal Chunder Das Gupta for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Ramani Mohan Chatterjee* for the Respondents.

* Appeal from Appellate Decree No. 18 of 1914, against the decree of Babu Ananda Kishore Datta Ray, officiating Subordinate Judge, 3rd Court of Mymensingh, dated the 8th of September, 1913, reversing the decree of Babu Woopendra Chandra Ghose, Munsiff, 4th Court, at Netrakona, dated the 16th August, 1912.

(1) (1909) 11 C. L. J. 16.
(2) (1912) 17 C. W. N. 1101.
(3) Unreported.
(4) (1914) 19 C. W. N. 268.

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July, 20.

The judgments of the Court were as follows :

D. Chatterjee, J.—In this case certain tenants sold portions of their occupancy holdings to the principal defendant and surrendered those portions only to the landlord and took from him leases at an enhanced rent in respect of the residue of their holdings. The landlord by virtue of the surrender wants to eject the principal defendant. The first Court disallowed the prayer for *khas* possession and the Lower Appellate Court has allowed it. The question before us is whether the decree for *khas* possession is right. The judgment of the Lower Appellate Court finds support in the cases of *Tomizuddin Khan* v. *Khoda Nawaz Khan* (1) : and *Ramoni Mohan Ray* v. *Sheikh Kaliumddi* (2). It is contended, however, that these cases were wrongly decided and in any case are no longer binding authorities as they are inconsistent with the later Full Bench Ruling in *Dayamayi's case* (3), and have been questioned in the case of *Askar Ali* v. *Gopi Mohon Roy Chowdhury* (4). I think these contentions are right and that the judgment of the Lower Appellate Court is wrong. It was held in *Dayamayi's case* (3) that the sale of a portion of an occupancy holding is valid and the landlord has no right to *khas* possession of the land. Now what more has taken place in this case ? The tenants sold portions of their occupancy holdings and had no right or interest left in the same. Then they made a show of a surrender of the self-same lands to the landlord. They had nothing to surrender and the landlord had no right to eject the purchaser. Then there is an amalgamation of these two nothings and at once the landlord is competent to eject the purchaser. It is true the landlord was not bound by the sale and could under section 86 (7), Bengal Tenancy Act accept a partial surrender: but this means a surrender of something which the tenant had to surrender. Apart from the meaning of the word 'surrender' in English Law, the word has a meaning as a word in the English language, to give up or resign or yield to the possession of another ; but the tenant has no right to give up or resign or yield what he has already sold. In this view of the case surrender is a misnomer for the act of the tenant and section 86 (5) even if it could apply to part-surrender (for the clause speaks of surrender of his holding) would not entitle the landlord to take *khas* possession. Nor in this view of the case is it

(1) (1909) 11 C. L. J. 16.
(2) (1912) 17 C. W. N. 1101.
(3) (1914) I. L. R. 42 Calc. 172 ; 20 C. L. J. 52.
(4) (1913) 18 C. L. J. 257.

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necessary to consider whether the word incumbrance in section 86 (6) includes the sale of a portion of a holding.

Having regard to the fact that I differ from the decision of the Court in the cases of *Tomizuddin Khan* v. *Khoda Nawaz* (1), and *Ramoni Mohan Ray* v. *Sheikh Kaliumddi* (2), the better course would perhaps have been to refer the matter to the Full Bench, but as I cannot do so alone and as the second branch of the argument, namely, the effect of *Dayamayi's case* (3) may be sufficient to dispose of the case I would allow the appeal.

As we differ on a point of law the case must go to the Chief Justice for reference to a third Judge. The point of law in respect of which we differ is—whether a raiyat having sold a part of his occupancy holding can surrender the self-same part to his landlord so as to entitle the latter to take *khas* possession of the said part by ejecting the purchaser?

Newbould, J.—The facts as found in this appeal are as follows:—The tenant of these holdings with occupancy rights under the plaintiff sold the plots of land in suit which form portions of the lands of these holdings to the principal defendant who is the appellant in this appeal. Subsequently these tenants orally relinquished the lands in suit in favour of the plaintiff and took fresh settlements at enhanced rates by executing kabuliats in respect of the remaining lands of their holdings. The appellant alleged that he had obtained a settlement of the disputed land from the plaintiff but this was found against him by the lower appellate Court, who granted the plaintiff a decree for *khas* possession.

On behalf of the appellant it is contended that the tenants after their sale to the appellant defendant were divested of all their interests in the land in suit and had nothing left to surrender to their landlord and consequently there was no valid surrender. It is also contended that the appellant defendant, as a transferee of a portion of an occupancy holding, is not liable to ejectment and further that he is protected by the provisions of section 86 (6) of the Bengal Tenancy Act, which provides that, when a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer.

In support of the first contention a passage from Foa's Landlord and Tenant (5th Edition, page 624) was read to us. But the

(1) (1909) 11 C. L. J. 16.
(2) (1912) 17 C. W. N. 1101.
(3) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.

general principles of English law that are relied on have no application to the present case. No English case could be cited to support the contention that the landlord would be bound by a transfer made by a tenant who had covenanted not to transfer. The position of a tenant of a holding not transferable without the landlord's consent is similar to that of an English tenant who has made such a covenant.

In my opinion the facts of the present case cannot be distinguished from the facts of the cases of *Tomizuddin Khan* v. *Khoda Nawas Khan* (1), and *Ramoni Mohan Ray* v. *Sheikh Kaliumddi* (2). In both these cases it was held that the sale of a portion of a non-transferable holding did not create an 'incumbrance' on the tenancy within the meaning of section 86 (6) of the Bengal Tenancy Act. In the former of these cases the tenant sold a portion of his holding without the landlords' consent and then surrendered that portion. The landlord then settled this surrendered portion with the plaintiff and it was held that the plaintiff could eject the transferee. In the latter case the facts still more closely resemble the facts of the present case. The tenant after selling a portion of his holding surrendered that portion and executed a kabuliat in respect of the remaining portion of the holding. It was held that upon such surrender the landlord was entitled to eject the transferee as a trespasser.

The learned Vakil for the appellant did not deny that these cases were in point but contended firstly that the decisions were erroneous and secondly, that they were opposed, to the later decision of the Full Bench of this Court in *Dayamayi's case* (3). In support of the first of these contentions he relies on the decision of a Bench of this Court in *Askar Ali* v. *Gopi Mohon Roy Chowdhury* (4). There the accuracy of the decision in *Tomizuddin* v. *Khoda Nawaz* (1) was doubted and Mookerjee J. in his judgment pointed out that at least four points required consideration before that case could be held to furnish a correct exposition of the law. I will therefore consider these points *seriatim*. The first point is that "the learned Judges adopted for the purposes of the interpretation of section 86, which finds a place in Chapter IX of the Bengal Tenancy Act, the definition of the term incumbrance given for

(1) (1903) 11 C. L. J. 16; 14 C. W. N. 229.
(2) (1912) 17 C. W. N. 1101.
(3) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(4) (1913) 18 C. L. J. 257.

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the purpose of Chapter XIV alone." This statement appears to be incorrect. The learned Judges remarked that the Subordinate Judge had accepted the definition of incumbrance in section 161 of the Rent Law. But though they quoted this definition and stated that the word was nowhere else defined in Indian Acts they appear to have accepted the meaning attached to this word in the English Conveyancing Act of 1881 (44 and 45 Vict. c. 41, section 2 (vii)).

The second point noticed is that "the decision of this Court in the case of *Chundra Sakai* v. *Kalli Prosanno Chuckerbutty* (1) shows that "an exchange is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, and in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale." The answer to this objection is that in the case cited the meaning of incumbrance as defined in section 161, Bengal Tenancy Act was being considered and as pointed out above the definition in that section is not applicable to the word as used in section 86 (6).

The third point is that "the effect of the decision is to place the purchaser in a worse position than a mortgagee or lessee under sub-section (6) of section 86." The result may seem anomalous, but that does not make the decision bad law. It is similar to the effect of the Full Bench decision in *Dayamayi's case* (2), which puts the purchaser of the whole of a non-transferable holding in a worse position, than the purchaser of a part. The last point is that, "it may be a question whether there can be a surrender, effective for the purposes of section 86 when the conditions mentioned in sub-section (5) cannot be fulfilled." Sub-section (5) of section 86 is as follows:—"When a raiyat has surrendered his holding, the landlord may enter in the holding and either let it to another tenant or take it into cultivation himself." I cannot see that this clause is any bar to the landlord making a fresh settlement with the original tenant after his surrender. Even if the agreement to make a re-settlement was entered into before the surrender, this, in the absence of collusion, would not make the surrender invalid. There is nothing in the law to prevent a surrender being made subject to conditions. In the case of *Askar Ali* v. *Gopi Mohon* (3), the question of the correctness of the decision in *Tomizuddin* v. *Khoda Nawaz* (4), was expressly reserved. After considering the objections, throwing doubt on its correctness, I see no sufficient

(1) (1895) I. L. R. 23 Calc. 254.
(2) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(3) (1913) 18 C. L. J. 257. (4) (1909) 11 C. L. J. 16.

reason for refusing to follow it, on the point that a sale of a portion of a holding is not an incumbrance within the meaning of section 86 (6), Bengal Tenancy Act. If it is not an incumbrance clause (7) of that section clearly provides for the valid surrender of a part of the holding.

The learned Vakil for the appellant relied on the unreported case of *Hussain Bibi* v. *Sadir Mohammed Sarkar* (1) which was followed in *Raghunath* v. *Cox* (2). Both these cases are distinguishable on the ground that the transfer made by the raiyat were by way of mortgage and were therefore obviously incumbrances within the meaning of section 86 (6). The recent case of *Nobo Kishore Saha* v. *Dhananjoy Saha* (3) is not in point as there the pretended surrender of the whole holding was held to be a collusive surrender and not a real surrender. Here there is no finding that the surrender was collusive and I see no reason for thinking that the landlord had any fraudulent intention in acting as he did.

Finally the effect of the decision of the Full Bench in *Dayamayi's case* (4) has to be considered. It was there decided that where the transfer is of a part only of the holding the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. This does not help the appellant as in the present case there has been a relinquishment of the holding. It may be conceded that relinquishment of the holding means a relinquishment of the whole holding but the whole holding has been surrendered. The part sold to the defendant appellant was expressly surrendered and the taking of a new settlement of the remainder of the holding operated in law as an implied surrender of the remaining portion. Clause (3) (*a*) of section 86 of the Bengal Tenancy Act shows that there can be implied surrender under that Act as well as under section 111 of the Transfer of Property Act which is not applicable to leases for agricultural purposes. It is contended that it was not the plaintiff's case as set forth in the plaint that there was a surrender of the whole holding. The facts that the tenants made *estifa* of some of the land of their holdings and executed separate registered kabuliats in favour of the plaintiff in respect of the remaining lands are set out in the plaints. It was open to the plaintiff at the trial to agree that these facts amounted to a surrender in law of the whole holding.

(1) Unreported. Second Appeal No. 2955 of 1911.
(2) (1914) 19 C. W. N. 268.
(3) (1916) 20 C. W. N. 610.
(4) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.

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I consider, therefore, the Lower Appellate Court was right in granting the plaintiff a decree for *khas* possession and would dismiss this appeal with costs.

The following order was then passed by

January, 11.

Sanderson, C. J.—The Judges composing the Bench which heard the above Appeal having differed in opinion on a point of law, let the said Appeal with the opinions of the said Judges, be laid before the Hon'ble Mr. Justice Chitty, under section 98, read with section 108 of the Civil Procedure Code, in order that he may deliver his opinion thereon.

January, 29.

Chitty, J.—This case was referred to me under section 98 of the Civil Procedure Code, 1908. The point of law is stated at the conclusion of the judgment of D. Chatterjee J. Newbould J. makes no reference to it, and it does not appear that the learned Judges joined in stating it as required by section 98. Directly I read the judgments, it appeared to me that I could not decide the point, as the learned Judges' judgments proceed upon different views of the facts. D. Chatterjee J. took the facts as found to be that the tenants in the case "sold portions of their occupancy holdings to the principal defendant (the present appellant) and surrendered those portions *only* to the landlord (the present respondent)." The facts on which the judgment of Newbould J. proceeds are, as found by the Lower appellate Court, that the tenants surrendered to the landlord both the portions sold and also the portions retained, thus making a surrender of the entire holdings. This difference, obviously, materially affects the decision of the appeal. Again if I were to agree with D. Chatterjee J. a reference to a Full Bench would be necessary, as he expresses an opinion that certain decisions of this Court are erroneous. Under the circumstances I discontinued the hearing, and I now submit the case to the Honourable the Chief Justice for further orders.

January, 30.

Sanderson, C. J.—Under the above-mentioned circumstances I remit, the case to Digamber Chatterjee and Newbould JJ. for further consideration.

The following judgment was then delivered:

[Jan]uary, 30.

As the learned Judge to whom the case was referred, has returned it on the ground, amongst others, that there are differences of fact as well as law, and as one of us agrees with the Court below, the decree of the Lower Court will be confirmed and the appeal dismissed with costs under sub-section 2 of section 98 of the Civil Procedure Code.

A. T. M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—*Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

KUMAR BASANTA KUMAR ROY AND OTHERS

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

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Limitation—Indian Limitation Act (XV of 1877), Sec. 3 and Sch. II, Arts. 142 and 144—Dispossession of owner of land—Discontinuance of possession—User of land—Constructive possession—Adverse possession—Diluvion—Reformation in situ—Yearly submersion of reformed land.

The term "dispossession" in article 142 of schedule II of the Indian Limitation Act, is not defined in the Act, but its meaning is well-known. A man may cease to use his land because he cannot use it, as when it is under water. He does not thereby discontinue his possession : constructively it continues, until he is dispossessed ; and upon cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment" [per Cotton, L. J. in *Leigh* v. *Jack* (1)]. It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to distinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

"To defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it" [per Bramwell, L. J., in *Leigh* v. *Jack* (1)], and therefore it is necessary to look at the position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor. An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts which *prima facie* are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object.

Marshall v. *Taylor* (2) relied on.

A chur which was held to be a reformation *in situ* of plaintiff's land, began to appear in 1888 as an island chur, which was considered as an accretion to a Government estate, but was unfit for assessment till 1890. It was not regularly surveyed till 1834, but, beginning in the year 1891-1892 it was under direct

(1) (1879) L. R. 5 Ex. D. 264 (274). (2) (1895) L. R. 1 Ch. 641 (645).

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management of the Government on the *utbandi* system on yearly settlement. In 1894 a small portion of the area of the chur was under cultivation and the residue was uncultivated jungle. The whole of it was every year completely under water from June to October. The chur remained in the possession of the Government until 1902, when the Government allowed the defendants' claim that the chur was reformation *in situ* of lands belonging to them and delivered the possession thereof to them. In September, 1904, the plaintiffs sued to recover possession but the defendants pleaded limitation and to make out their case claimed to tack on to their period of possession the period of Government's possession :

Held, that on the evidence whether the land cultivated was the same each year or not did not appear ; at any rate, it was annually submerged, and there were no circumstances to link together various portions of ground, so as to make the possession of a part, as it emerged, amount constructively to possession of the whole ; *Mohini Mohan Roy* v. *Promada Nath Roy* (1) approved

Held, also, that there had not been down to September, 1892, any dispossession of plaintiffs within the meaning of Art. 142 ; and that if no dispossession occurred, except possibly within twelve years before the commencement of the suit, article 144 was the article applicable, and not article 142.

Held, further, that when the chur was submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owners, the plaintiffs : *Secretary of State for India in Council* v. *Krishnamoni Gupta* (2) followed.

Held, finally, that the defendants, who successfully claimed adversely to the Government, did not derive their liability to be sued "from or through" the Government within the meaning of the definition of the term 'defendant' in section 3 of the Indian Limitation Act, and consequently they were not entitled to tack on to the period of their own possession any portion of the period during which the Government was in possession, and that the suit was not barred under article 144.

Guru Das Kundu Chowdhury v. *Kumar Basanta Kumar Roy* (3) reversed.

Appeal from a decree of the High Court (3) at Calcutta (Chitty and Carnduff, JJ.) (July 12, 1909) reversing a decree of the Subordinate Judge of Nuddia (June 30, 1906).

A certain zemindari of the Hooghly District was long divided into two seperate mahals, known as Lot Mahomed Aminpur (Touzi No. 3969) and Lot Gobindpur (Towzi No. 100) respectively. Plaintiffs-appellants are the proprietors of a half of lot Mahomed Aminpur, the owner of the other half being Maharajah Sir Jatindra Mohan Tagore. The defendants-respondents other than the Secretary of State, the Kundu Babus, are proprietors of lot Gobindpur.

(1) (1895) I. L. R. 24 Calc. 256 (259).
(2) (1902) L. R. 29 I. A. 104 ; I. L. R. 29 Calc. 518.
(3) (1909) 11 C. L. J. 373.

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The lands in suit were alleged by plaintiffs and admitted in the first Court by defendants to be reformations *in situ* of diluviated lands of three mouzahs which admittedly appertained as to 10 annas to Lot Mahomed Aminpur and as to 6 annas to Lot Gobindpur.

The lands reformed gradually from about 1889 onwards. In that year a chur formed and increased year by year; for some years it was entirely submerged from June to October. The revenue authorities at first settled annually so much as was cultivable with the actual cultivators on the *utbandi* system, and later made longer settlements. Up to 1894 plaintiffs, who succeeded their father in 1883, were minors under the Court of Wards. About 1902 both plaintiffs and the Kundu Babus laid claim to the lands. Government allowed the claim of the Kundu Babus and delivered possession to them.

Thereafter, on September 6, 1904, appellants sued the Kundu Babus, the Secretary of State, and the actual ryots, also impleading their co-owner the Maharaja. The plaintiffs prayed for the recovery of possession, jointly with their co-sharer, of a 10 annas share in the reformed lands of the said mouzahs with mesne profits. The Kundu Babus (hereinafter described as the defendants) denied plaintiffs' title and pleaded *inter alia* limitation on the ground of adverse possession.

The Subordinate Judge held that plaintiffs' title was made out and that the suit was not barred by limitation. He decreed the suit. On appeal his decision was reversed by the High Court (1) (Chitty and Carnduff JJ.) who did not consider the question of plaintiffs' title since they held it to be clearly established that the plaintiffs have never held possession, actual or constructive, of any portion of the lands in dispute since the reformation in 1888; that at least from 1889 the Government were in possession adversely to the plaintiffs until 1902, when they released the whole to the Appellants (defendants) and that from 1902 that adverse possession was continued by the appellants." They therefore held that the suit was barred under Art. 144 of the Limitation Act, 1877. For a report of the case before the High Court: see *Guru Das Kundu Chowdhury* v. *Kumar Basanta Kumar Roy* (1).

Sir Robert Finlay, K. C. and *Kenworthy Brown*, for the appellants: There are two questions for determination in this appeal. Firstly, whether the plaintiffs have proved their title, and secondly, whether the suit is barred by limitation. As to the first point the

(1) (1909) 11 C. L. J. 373.

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Subordinate Judge has found in plaintiffs' favour, and though the High Court has indicated some doubts about his finding, the High Court has not overruled it. As to the second point the Subordinate Judge held that the suit was not barred, but the High Court came to the conclusion that it was barred by Art. 144 of schedule II. of Indian Limitation Act, 1877.

It is submitted that the finding of the Subordinate Judge that the plaintiffs have proved their title is right. The respondents now dispute the identity of the lands and claim that a great part of them is part of an older chur which they occupied long ago. This is a new case altogether, and the defendants are not entitled to raise it here for the first time. Reference was made to *Raj Kumar Roy* v. *Gobind Chunder Roy* (1).

Art 144 of the Limitation Act, is the article applicable to the case and not Art. 142. The burden of proving adverse possession is on the defendants : *Radha Gobind Roy* v. *Inglis* (2), and *Secretary of State for India* v. *Chelikani Rama Rao* (3). It may be true that under the old law the burden of proof in these cases lay on the plaintiff to prove possession within 12 years of suit : *Maharajah Koowur Baboo Nitrasur* v. *Baboo Nund Loll Singh* (4), and *Koomar Runjit Singh* v. *Schoene, Kilburn & Co.* (5). But the old law was altered by the Limitation Act of 1871, under which plaintiffs can sue within 12 years from the time when the possession of the defendant, or some other person through whom he claims, became adverse to him : *Rao Karan Singh* v. *Rajah Bakar Ali Khan* (6). The onus in such case is on the defendant claiming adversely : *Innasimuthu Udayan* v. *Upakarathudayan* (7).

The 12 years' adverse possession required by Art 144, must be 12 years' adverse possession by the defendant or any person "from or through" whom he claims : Limitation Act, section 3, definition of defendant. But, here, the defendants are not claiming "from or through" the Government and consequently they are not entitled to tack on to the period of their own possession the period during which the Government had possession, even if the latter were adverse, for adverse possession by a series of independent trespassers confers no right on any one of them who has not himself had uninterrupted possession for the period required by law : *Dixon* v.

(1) (1892) L. R. 19 I. A. 140 (146, 149) ; I. L. R. 19 Calc. 660.
(2) (1880) 7 C. L. R. 364.
(3) (1916) L. R. 43 I. A. 192 (203, 204) ; 25 C. L. J. 69.
(4) (1860) 8 M. I. A. 199 (220). (5) (1879) 4 C. L. R. 390.
(6) (1882) L. R. 9 I. A. 99 ; I. L. R. 5 All. 1.
(7) (1899) L. R. 26 I. A. 210 ; I. L. R. 23 Mad. 10.

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Gayfere (1), which was adversely commented on by Cockburn C. J. in *Asher* v. *Waitlock* (2); and *Trustees, Executors and Agency Co.* v. *Short* (3). It should be remembered that there is nothing in India corresponding to 3 and 4 Will 4. C. 27, section 4, nor is there any decision as to the time after which ouster is presumed. Moreover, the adverse possession must be continuous; but, here, there was no possibility for any one to have continuous possession for 12 years before suit, as the whole chur was every year submerged under water from June to October, and such submergence determines the possession of a trespasser, who is taken in law to have abandoned his possession: *Secretary of State for India* v. *Krishnamoni Gupta* (4), and *Secretary of State for India* v. *Chelikani Rama Rao* (5). Reference was also made to *Prince Mirza Jehan Kudr Bahadur* v. *Nawab Afsur Bahu Begum* (6), *Mohima Chundar Mozoomdar* v. *Mohesh Chundar Neogi* (7) and *Nawab Muhammad Amanulla Khan* v. *Badan Singh* (8), were distinguished.

Further the plaintiffs were until 1894 wards of the Court of Wards, and the Board of Revenue which had possession of the chur, is the Court of Wards, and consequently such possession could not be adverse to the plaintiffs: *Thomas* v. *Thomas* (9) and 2 Smith's *Leading cases*, 12th ed., p. 667 et seq., where the cases are collected and discussed.

Lastly, the plaintiffs and some of the defendants were tenants in common, and the possession of the latter is also the possession of the former: *Jogendra Nath Rai* v. *Baldeo Das* (10).

De Gruyther, K.C., and *O'Gorman*, for the Respondents: The plaintiffs have not made out their title to the three mouzahs, which belonged before submersion to the defendants' Mahal lot Gobindpur. The plaintiffs' claim included lands which did not belong to the chur in dispute, and they are not entitled to recover such lands. The article of the Limitation Act applicable to the case is Art 142 and not Art 144, and the plaintiffs have been dispossessed within the meaning of Art 142 more than 12 years before suit, which is consequently barred: *Nawab Muhammad Amanulla Khan* v. *Badan Singh* (8).

(1) (1853) 17 Beav. 421 (430). (2) (1865) L. R. 1 Q. B. 1 (4).
(3) (1888) L. R. 13 A. C. 793.
(4) (1902) L. R. 29 I. A. 104; I. L. R. 29 Calc. 518.
(5) (1916) L. R. 43 I. A. 192; 25 C. L. J. 69.
(6) (1878) L. R. 6 I. A. 76.
(7) (1888) L. R. 16 I. A. 23; I. L. R. 16 Calc. 473.
(8) (1889) L. R. 16 I. A. 148; I. L. R. 17 Calc. 137.
(9) (1855) 2 K. and J. 79.
(10) (1907) I. L. R. 35 Calc. 961; 6 C. L. J. 735.

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Even if Art. 144 applies, Government had held adversely. Their possession is defendants' possession. The Government took possession not on behalf of anybody, but as owners or proprietors. It was asserting its rights under Bengal Regulation XI of 1825, section 4. The regular tenancy under the Government commenced in 1891, before which there had been *utbandi* tenancy. If the plaintiffs had sued the Government in 1904, their suit would have been dismissed. The plaintiff's title had beeen extinguished under section 28 of the Limitation Act, and could not be revived.

There is no question of co-ownership, the two estates were separate and their respective owners pay separate revenue.

As to possession of the Court of Wards the High Court was right in rejecting the plaintiffs' contention: *Chowdhree Shooraj Singh* v. *The Collector of Moradabad* (1).

As to the title, the case now made is that these villages are still joint, a 10 anna share belonging to the plaintiffs and a 6 anna share to the defendants, while the rest of the property is partitioned. This is a new case and was not set up in the Court below. The fact is that there was a partition of the whole of the estate and these three mouzahs belong to the defendants' mahal.

No reply was called upon.

The judgment of their Lordships was delivered by

February, 1.

Lord Sumner:—This suit was brought by members of a family called the Kumars of Dighapatia against certain persons, called collectively the Kundu Babus of Mahiari, to recover khas possession, jointly with their co-sharer maliks, of a 10-anna share in portions of mouzahs Durlabhpur, Jirat, and Hatikanda. Wasilat was also claimed. Some years ago the Ganges overflowed these lands. They have now reformed *in situ*.

The plaintiffs held one moiety of the zemindari lot Mahomed Aminpur, the other moiety being held by various persons, who were joined as subordinate defendants. To this mahal, bearing Towzi No. 3989 of the Hooghly Collectorate, this 10-anna share was said to have belonged for at least a century. The 6-anna share was the property of the principal defendants in right of their zemindari, viz., lot Gobindpur bearing Towzi No. 100. The Trial Judge found for the plaintiffs' title. The High Court criticised this decision as having been arrived at "without any real discussion or consideration of the documentary evidence," but did not expressly dissent from it. They allowed the appeal on another ground. Having examined

(1) (1870) 2 N. W. P. H. C. R. 379.

the documentary evidence in question with some care, their Lordships conclude that the decision of the Trial Judge in this regard was right.

The plaintiffs put in an extract from the Quinquennial Register of pergunnah Mahomed Aminpur, for A.D. 1816, which showed that a 10 anna share in each of the three mouzahs then belonged to Taluq Mahomed Aminpur. An extract from the Mahalwari Register, apparently for A.D. 1880, showed these mouzahs still belonging to Mahomed Aminpur, though not under the same Towzi number, and stated the maliks, as recorded in the General Register, to be certain persons of whom one was Purna Chandra Roy, the plaintiffs' predecessor in title. It further remarked that part or all of the land of these mouzahs was ijmali, without naming either the co-sharers or the proportions of the shares. No doubt these entries are in some respects inconclusive. For several years, from 1888 onwards until 1891, when the guardianship of the Court ended, the plaintiffs were minors, whose property was in the charge of the Court of Wards, and they produced documents showing that year after year each of these mouzahs was administered on their behalf, and that rents and profits collected in respect of them were credited to the account of the plaintiffs. Amdanis of money on account of rent, Towzi accounts, extracts from the jumma-wasil-baki accounts and karcha accounts were forthcoming in regular sequence, in which the plaintiffs were stated to be proprietors and their share to be a 10-anna share in Towzi No. 3989. To these proofs of enjoyment no real answer was made, and their Lordships see no reason to question the finding of the Trial Judge in favour of the plaintiffs' title.

The identity of the lands in suit held by the principal defendants with those originally washed away, to which the plaintiffs made title, was accepted by the Trial Judge, doubted but not decided by the High Court, and strenuously contested before their Lordships. Before the trial an ameen was appointed to survey the *locus in quo* and set it out on a map. The limits of the ground in dispute were agreed and shown on this map. Portions of each of the three mouzahs fell beyond them. At the instance of the principal defendants the ameen also prepared a map purporting to show the natural features "as contained in the release map of 1886." In his report he stated that the latter features depended on the position of a palm-tree, which was taken as the datum because it was said to be the only thing that had survived from 1886, and to be identical with a palm-tree shown on a copy map produced by the defendants

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and alleged to be a map of things as they were in that year. No proof of the identity of this palm-tree was forthcoming; no thak map was produced; no release of 1886 or any evidence of it was put in. It is plain that the ameen thought that this map of the supposed features of 1886 was not worth much, and their lordships think so too.

The respondent's argument rested on three points: first, that since 1886 they had been, as they said, in possession of certain portions of a chur known as Chur Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906, it would be seen that part of the area disputed in this action, though claimed as part of Chur Raninuggur No. 2, really fell within Chur Raninuggur No. 1, and that there had been a confusion of mouzah Jirat, which lay in the north of the disputed area, with an area called Chur Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now [*Rajcoomer Roy's case* (1)] to deprecate the practice of "propounding riddles of this kind," and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now. The trial Judge records that, "it is admitted on both sides that the lands in suit are reformations on their old sites of diluviated lands on mouzahs Durlabhpur, Jirat, and Hatikanda." On that admission he proceeded, and by that admission, in their Lordships' opinion, the respondents must be bound. In the result the plaintiffs have made out their case alike as to title and parcels.

There remains the question on which alone the High Court proceeded, the question of limitation. This involves some account of the history of the reformed land. At the date of the Government survey of 1869 and 1870 the three mouzahs lay to the west of the Bhaghirathi. Shortly after that date the river began to traverse bodily to the south-west, in a direction at right angles to the axis of its course at that part of the stream, and steadily moved for some miles across country till in 1906 only portions of Jirat and Hatikanda and no part of the Durlabhpur were any longer to the west of the river. The total area submerged no doubt extended far beyond the bounds of these mouzahs. As the river passed on churs began to form. Chur Raninuggur No. 1 was the first; Chur Raninuggur No. 2, somewhere within which the present reformations fall, began to appear as an island chur in 1888. The plaint in the present suit

(1) (1892) L. R. 19 I. A. 140 (146); I. L. R. 19 Calc. 660.

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was filed on the 6th September. 1904. It is common ground that the period of limitation applicable is twelve years, the contest being whether article 142 of Schedule II of Act XV of 1877 is the article applicable or article 144. The critical time is the time prior to the 6th September, 1892.

A great body of evidence was called, of which the Trial Judge says that the witnesses "have sworn hard without any regard to truth." Neither side has ever thought it worth while to quote what they said to their Lordships. If the appellants are right, the question is whether the respondents had adverse possession before September, 1892; if the respondents are right, the question is whether before that time the appellants had not been dispossessed. A good deal has been said about the burden of proof in either case, but as their Lordships find the evidence sufficient to establish a clear conclusion of fact, it cannot matter now by which party it was given. Their Lordships accordingly pass by the question who would have suffered if the facts had turned out otherwise or had not been proved at all, and proceed to examine them.

The best evidence of the history of the chur lands in question is to be found in the Collectorate reports of the Settlements of 1894, 1899, and 1902. An island chur in or about this spot was thrown up in 1888, but was unfit for assessment, and apparently for cultivation, till 1890. At first the surrounding water was unfordable on all sides, but further accretions soon attached it on the north to Chur Raninuggur No. 1. In 1889 it was first treated as an accretion to Chur Raninuggar No. 1 and Jirat, which had been released to Suksagar zemindars, as reformations *in situ* of their mouzahs, and then shortly afterwards came to be considered as an accretion to the part of Chur Raninuggur No. 1, which was a Government estate. It was regularly surveyed till 1894, but, beginning in the year 1891-1892, it was under direct management on the *utbandi* system on yearly settlements. The area then producing a rent was about 350 bighas; in the following year it was slightly more. On the survey in 1894 the area of this chur was found to be 2,060 bighas, of which 583 were by this time under cultivation. The residue was uncultivated jungle, and the whole of it was every year completely under water from the beginning of June to the end of October. Naturally, the land was then very poor, and there was no resident raiyat in the mahal.

The chur had so far increased by 1894 that a raiyatwari settlement was then made with the *utbandi* raiyats for a term of five years. On the expiration of this term it was again surveyed, and

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its area was found to have increased to over 3,000 bighas, and 86½ acres of it were released to the proprietor of estate No. 399, as being land which was a reformation *in situ* of his mouzah Sardanga. It would seem that a further portion of it had been previously released to the owner of mouzah Baliadunga. The cultivable lands were then settled again for an undefined term.

In 1902 the principal defendants petitioned the Collector of Nadia for the release to them of the lands in question, alleging that they were reformations *in situ* of lands belonging to their estate, lot Gobindpur, Towzi No. 100, and ten months later the officiating collector granted the petition. In his judgment the petitioners had proved their title and the identity of the reformed lands, and the Government could not legitimately resist their claim. Accordingly possession was delivered in due form, by planting a bamboo on the estate, by proclamation, and by beat of drum.

The report of 1899 in terms speaks of these reformed lands as being the "property" of the Government resumed in 1888, which at most means that in time the Government's actual possession, such as it was, might be expected to ripen into ownership. The report of 1902 speaks of possession, direct management, and settlement. The order of 1903, while avoiding the term "property," because it recognised the property of the petitioners, recited that the Government took possession of Chur Raninuggur No. 2 in 1888, the year in which it came into existence as a chur. These documents, however, were reciting what had happened some years before, and presumably after some change of collectors in the meantime, and it is very noticeable that in the *khasras* of the chur the column headed "Name of proprietor and landlord," appears to have been left blank until 1899, when it is filled in for the first time with the name of the Empress of India.

The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment" (per Cotton, L.J., in *Leigh* v. *Jack* (1)). It seems to follow that there can be no continuance of adverse possession, when the land

(1) (1879) L. R. 5 Ex. D. 264 (274).

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is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

In the case of *Krishnamoni Gupta* (1), their Lordships' Board applied this view to a case, where a river shifting its course first in one direction and then in the opposite direction, first exposed certain submerged lands, of which the Government took possession, and then after a few years flooded them again. No rational distinction can be drawn between that case and the present one, where the reflooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner.

Again, to apply the test suggested by Bramwell, L.J., in *Leigh* v. *Jack* (2), at p. 273, "to defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it," and therefore it is necessary to look at the position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor. "It is impossible," says Lord Halsbury in *Marshall* v. *Taylor* (3), "to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice Cotton said in *Leigh* v. *Jack* (2), to the nature of the property." An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts which *prima facie* are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object. In the present case beyond the temporary *utbandi* cultivation itself there is nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue authorities.

Their Lordships are of opinion that, whatever may have been the case later on, there had not been, down to Septemher 1892, any dispossession of the plaintiffs within the meaning of article 142.

(1) (1902) L. R. 29 I. A. 104; I. L. R. 29 Calc. 518.
(2) (1879) L. R. 5 Ex. D. 264 (273).
(3) (1895) 1 Ch. 641 (645).

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The evidence of possession by the Government consists in the direct management under which *bandobastodars* cultivated at annual rents. Two collectors' orders, dated in 1889, are referred to, but not exhibited, under which the land was first of all "treated" as an accretion to one property and almost immediately afterwards "considered" as an accretion to another; but, beyond the utbandi cultivation, nothing was done. Whether the land cultivated was the same each year or not does not appear; at any rate, it was annually submerged, and there are no circumstances to link together various portions of ground, so as to make the possession of a part, as it emerged, amount constructively to possession of the whole [*Mohini* v. *Promoda* (1)]. The lands in question in this suit form only a part of Chur Raninuggur No. 2. It cannot be shown that they formed part of the land cultivated, or of the chur which had emerged up to 1892. It is quite possible that most, if not all, of the land cultivated between 1891 and 1893 may have belonged to the land, which was shortly afterwards released to the Baliadunga and Sardanga zemindars. It is clear that in those early years there was considerable uncertainty as to the course the reformation was taking, and the fact must have been well known that the chur might turn out to be a reformation *in situ* of the land, which had only diluviated within the previous twenty years.

If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, article 144 is the article applicable, and not article 142. It is not easy to see in the circumstances of a case such as this how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendants; but, be that as it may, in their Lordships' opinion the defendants' contention resting on article 144 fails on another ground. The period of time requisite to bring the defendants under the protection of article 144 cannot be made out, unless to the period during which the defendants have been in possession there is tacked, out of the prior period when it is contended that the Revenue authorities had possession, a number of years going back to 1892. The definition section, §, 3, shows that in the present case this cannot be done. The defendants do not derive their liability to be sued "from or through" the Revenue authorities in any sense of the words. They advanced a claim of their own adversely to the Revenue authorities, which was rested on prior title and possession, and sought to put an end to conduct on the part of those authorities which, they asserted, was

(1) (1896) I. L. R. 24 Calc. 256 (259).

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inconsistent with and an invasion of their own superior title. On investigation the Revenue authorities recognised and submitted to this adverse claim and withdrew from any enjoyment or occupation. If the defendants could make good now the claim which they made then well and good; but they would succeed, not by reason of, but independently of, the Limitation Act. Upon this ground they fail as far as article 141 is concerned.

In this view of the case it is not necessary to decide two points much discussed before their Lordships: first, that the defendants' possession could not, as such, be deemed to be adverse to their co-sharers or available to deprive the plaintiffs of their rights; and, second, that the possession of the Revenue authorities could not be availed of against the plaintiffs by reason of their being at the time minors under the guardianship of the Court of Wards. In differing from the High Court upon the determination of the appeal, their Lordships do not wish to be taken as expressing any opinion adverse to their view on this second point.

In the result their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, the judgment of the High Court should be set aside with costs, and the decision of the Trial Judge should be restored. As the first defendant on the record, the Secretary of State for India in Council, lodged no case and did not appear before their Lordships to support or resist the appeal, their Lordships do not advise that the terms of any order as to costs should affect him.

Watkins & Hunter:—Solicitors for the Appellants.

T. L. Wilson & Co.:—Solicitors for the Respondents.

J. M. P. *Appeal allowed.*

PRESENT: *Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

RAJA RANJIT SINGH BAHADUR

v.

SRIMATI KALI DASI DEBI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

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Patni tenure—Chowkidari Chakran lands—Bengal Permanent Settlement—The Village Chowkidari Act (Bengal Act VI of 1870), sections 49, 50, 51—Bengal Regulation VIII of 1793, sections 36, 37, 38, 39, 40, 41.

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Chowkidari Chakran lands resumed by Government and transferred to the zemindar under Bengal Act VI of 1870 pass by virtue of such transfer to the holder of a patni lease of the villages within which such lands are situate.

The *prima facie* title of the zemindar to chakran lands within his zemindari is recognised by the Permanent Settlement. The zemindar's interest in such lands, in the absence of express provision to the contrary, passes under a patni grant thereof.

Not only does Bengal Act VI of 1870 recognise the existing title of the zemindar to the lands resumed, but the estate taken by the zemindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the zemindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under those contracts are preserved.

Joykishen Mukerji v. *Collector of East Burdwan* (1) relied on. *The Secretary of State for India* v. *Kirtibas Bhupati Harichandan Mahapatra* (2) distinguished.

Consolidated appeals from two judgments and twenty decrees of the Calcutta High Court, passed in second appeal from various Courts in the Birbhum District.

Twenty suits were brought by various plaintiffs to recover possession from the defendant Raja, who held large zemindaris in the Birbhum District, of chowkidari chakran lands resumed by Government and transferred to him under Bengal Act VI of 1870. Each plaintiff was the patnidar or dar-patnidar of the village within which the lands subject of the suit were situate. In these suits in which the darpatnidar was plaintiff the patnidar was made a defendant. The decree in each suit was in favour of the plaintiff and was confirmed on appeal by the High Court: See *Ranjit Sing* v. *Kali Dasi Debi* (3), where one of the two judgments of the High Court is reported. The other judgment dealt with the question of limitation, which was not raised in this appeal.

Several other respondents did not appear.

De Gruyther, K. C., (Eddis with him) for the appellant: The Village Chowkidari Act, 1870, does not apply to chowkidari chakran lands unless they were excluded from the revenue settlement. The onus of showing that they were excluded is on the Government. The very fact of these lands falling under the Act shews that they were not included in those settled with the zemindar: *The Secretary of State for India* v. *Kirtibas Bhupati Harichandan Mahapatra* (2), *Ram Chandra Bhanj Deo* v. *Secretary of State for India* (4).

(1) (1864) 10 M. I. A. 16.
(2) (1914) L. R. 42 I. A. 30; 21 C. L. J. 31; I. L. R. 42 Calc. 710.
(3) (1909) I. L. R. 37 Calc. 57.
(4) (1916) L. R. 43 I. A. 172; 24 C. L. J. 296; I. L. R. 43 Calc. 1104.

Here the chowkidari chakran lands did not belong to the zemindar at the date of the patni leases. The profits of these lands were not taken into account in fixing the assessment. The zemindar had no right in the lands under Bengal Regulation VIII of 1793 : he merely had a certain call on the services of the chowkidars. Bengal Regulation XXII of 1793 gives the right of nominating chowkidars to the zemindar: there is no authority to the effect that such a right passed to the patnidars and no suggestion that the patnidars in fact exercised such a right.

Bengal Regulation VIII of 1793 is relied on as showing that the zemindars had the proprietary right in their lands : but section 4 of that Regulation only covers cases when Government assessed rent or revenue on the lands. Here no revenue was assessed on the lands in question.

Our title to these lands is a new title under Bengal Act VI of 1870 arising long after the patni leases were made.

At first the police in Bengal came under the zemindars : Harington's Analysis, Vol. 1, pp. 459, 513. The zemindars entertained tannahdars and pykes ; and remunerated them either by assigning them chakran land or by money. In the calculation of the revenue the profits of such chakran land were not brought into account, and deductions were made in favour of the zemindar for money payments made by him. This was altered by Regulation 1 of 1793, section 8, Cl. (4). The police control was taken away from the zemindars ; the allowances were resumed, and the lands assigned by the zemindars were left to them until Act VI of 1870, after and in consequence of which they were given the proprietary right in such lands : *Joykishen Mukerji* v. *Collector of East Burdwan* (1), *Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* (2). Reference was also made to *Hari Narain Mozumdar* v. *Mukund Lal Mandal* (3), *Upendra Narain Bhuttacharjee* v. *Pratap Chunder Pardhan* (4), *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (5) ; *Ranjit Singh* v. *Radha Charan Chandra* (6) ; *Jonab Ali* v. *Rakibuddin Mallik* (7) ; *Kasi Newaz Khoda* v. *Ram Jadu Dey* (8) and *Binad Lal Pakrashi* v. *Kalu Pramanic* (9).

(1) (1864) 10 M. I. A. 16 (17, 18, 20).
(2) (1914) L. R. 42 I. A. 30 ; 21 C. L. J. 31 ; I. L. R. 42 Calc. 710.
(3) (1900) 4 C. W. N. 814 (817).
(4) (1904) I. L. R. 31 Calc. 703.
(5) (1906) 5 C. L. J. 299 ; I. L. R. 33 Calc. 596.
(6) (1907) I. L. R. 34 Calc. 564.
(7) (1905) 1 C. L. J. 303.
(8) (1906) 5 C. L. J. 33 ; I. L. R. 34 Calc. 109.
(9) (1893) I. L. R. 20 Calc. 702.

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Sir H. Erle Richards, K. C. (Dunne and *H. N. Sen* with him) for the respondent Panchanani Dasi: There are three obstacles to Appellant's case:

(1) Section 41 of Reg. VIII of 1793. (2) The matter is concluded by *Joykishen Mukerji* v. *Collector of East Burdwan* (1) and (3) there has been at Calcutta a current of decisions against their contention extending from 1900 till now, with the one exception of *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (2), which is to some extent in his favour.

I have in my favour findings of fact that the lands are within the ambit of my *patni* and that the chowkidars were in my service.

Appellant's contention that the lands did not belong to him as zemindar was not raised in the Courts below, where the question argued was limitation. The present question is one of fact and cannot be raised now.

Apart from this, the contention fails on the merits. Lakheraj lands are dealt with in section 36 of Bengal Reg. VIII of 1793. Section 41 lays down in terms that chakran lands are not meant to be included in the exception contained in section 36 and are declared responsible for the public revenue. If, as is now contended, these lands belonged to Government independently, there is no sense in making them security for the revenue.

Lord Kingsdown, in *Joykishen Mukerjee's case* (1) at p. 43, explains that chakran lands were included in the malguzar's lands for the purpose of securing the assessment, because in the event of a sale for non-payment, it was important they should be transferred to the purchasers, with whom the appointment of the chowkidars would rest.

There is a direct decision of the Calcutta High Court against appellant's contention: *Kazi Newaz Khoda* v. *Ram Jadu Dey* (3). The same point arose, but was not even argued in *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* (4). The case of the *Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* (5) is really against the appellant, it lays down that the zemindar is entitled as such to chowkidari chakran lands within his zemindari. The same principle is recognised in *Ram Chandra Bhanj Deo* v. *Secretary of State for India* (6).

(1) (1864) 10 M. I. A. 16.
(2) (1906) 5 C. L. J. 299; I. L. R. 33 Calc. 596.
(3) (1906) 5 C. L. J. 33; I. L. R. 34 Calc. 109.
(4) (1908) 7 C. L. J. 439; I. L. R. 35 Calc. 346.
(5) (1914) L. R. 42 I. A. 30; 21 C. L. J. 31; I. L. R. 42 Calc. 710.
(6) (1916) L. R. 43 I. A. 172; 24 C. L. J. 296; I. L. R. 43 Calc. 1104.

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By section 51 of the Act VI of 1870 the transfer of chakran lands to the zemindar under that Act is "subject to all contracts theretofore made &c" : Patni leases are contracts within the meaning of that section.

Sir W. Garth for Rani Mina Kumari Saheba.

Eddis in reply : Our point was taken in the original Court and is still open to us.

We do not say the case of *Secretary of State* v. *Kirtibas* (2) is wrong : we rely on it. In that case the lands were lands belonging to the zemindar, assessed to revenue, but assigned by the zemindar for service purposes, and therefore, though called chowkidari chakran lands, did not fall within the definition in Act VI of 1870. This is the converse case—the lands here are lands not assessed to revenue and falling within the definition.

Their Lordships' judgment was delivered by

January, 24.

Lord Parker of Waddington :—This is a consolidated appeal from decrees of the High Court of Judicature at Fort William in Bengal, made in twenty suits, each of which, though relating to a distinct subject-matter, raised substantially the same questions of law. Each suit was in substance a suit to recover possession from the appellant, who is the registered proprietor of extensive zemindaries in the Birbhum district of Bengal, of chowkidari chakran lands recently resumed by government and transferred to him under the provisions of Act VI of 1870 of the Bengal Council. The plaintiff in each suit was the Putnidar or Dar-putnidar of the village within the boundaries of which the lands subject of the suit were situate. In those suits in which Dar-putnidar was the plaintiff, the Putnidar was made a defendant, but took no part in the argument. The decree in each suit was in favour of the plaintiff and against the appellant.

Their lordships consider it unnecessary to deal at further length with the history of the litigation. It is abundantly clear from the facts found in the Courts below, and was not disputed before their Lordships' board, that any interest which the appellant or his predecessors in title, originally had in the lands the subject of each suit had, prior to the resumption and transfer of such lands under the Act of 1870, been transferred to and become vested in the plaintiff Putnidar or Dar-putnidar by virtue of the lease or sub-lease under which he held the villages in which these lands were situate. Two points only were argued before their lordships. It was contended

(2) (1914) L. R. 42 I. A. 30 ; 21 C. L. J. 31. I. L. R. 42 Calc. 710.

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first, that the proprietor with whom a zemindari was settled under the Bengal Permanent Settlement, did not obtain or retain in the chowkidari chakran lands situate within the territorial boundaries of a village comprised in his zemindari any interest capable of being made the subject of a Putni lease; and *secondly*, that even if he obtained or retained any such interest, the effect of the Act of 1870 was to confer on him a new title not in any way affected by any Putni lease theretofore granted by him or his predecessors in title. In order to arrive at a conclusion on these questions, it is necessary to consider (1) the nature of chowkidari chakran lands (2), the provisions of the Bengal Permanent Settlement, and (3) the true meaning and effect of the Act.

At the time of the English occupation a zemindar was responsible not only for the payment of the revenue, but for the preservation of peace and order within his district. For the latter purpose he maintained Tannahdars, or police officials, and chowkidars, or village watchmen. Both had from time immemorial been remunerated by allotments of land to be held in consideration of the services they rendered to the zemindar, either rent-free or at a low rent, but whereas the police official rendered police service only, the chowkidar not only assisted the police, but rendered acts of service personal to the zemindar. Chakran lands are lands held by service tenure. Generically the term includes all lands so held, whether by police officials, Chowkidars, or persons whose only duties are personal to the zemindar. The expression "Tannahdari lands or Tannahdari Chakran lands" means lands held on service tenure by Tannahdars or police officials. The expression "Chowkidari Chakran lands" means lands held on service tenure by Chowkidars, or village watchmen. As one would naturally expect, it had long been customary, in fixing the revenue or jumma payable for the Zemindari, to leave Tannahdari and Chowkidari Chakran lands out of account.

Passing to the settlement of 1793, it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the English occupation the Zemindars had any proprietary interest in the lands comprised within their respective districts, the settlement itself recognises and proceeds on the footing that they are the actual proprietors of the land for which they undertake to pay the Government revenue. The settlement is expressly made with the "Zemindars, independent Talukdars and other actual proprietors of the soil" (see Regulation I, section 3, and Regulation VIII, section 4). It is clear that since the settlement the Zemindars have had at least a *prima facie* title to all lands for which they pay

revenue, such lands being commonly referred to as Malguzari lands (see the case of *Rajah Sahib Perhlad Sein* (1).

Bearing this in mind, their Lordships will proceed to consider the regulations of the permanent settlement, so far as they deal with Chakran lands. The leading authority on this subject is *Joykishen* v. *Collector of East Burdwan* (2). To use Lord Kingsdown's expression in that case, the effect of the settlement is to divide Chakran lands into two classes, namely, (1) Tannahdari Chakran lands, that is, lands held on service tenure by police officials, and (2) all other Chakran lands. As to Chakran lands of the former class, they were by Bengal Regulation I, section 8, clause 4, made resumable by Government, the Government relieving the Zemindar from the duty of maintaining a police establishment. These Tannahdari Chakran lands were, in fact, shortly afterwards resumed and became Government lands, the title of the Zemindar being extinguished by such resumption. As to all other Chakran lands, whether held by public officers or private servants in lieu of wages, they are dealt with by Bengal Regulation VIII, section 41.

In order to understand the 41st section of the last-mentioned Regulation, it is necessary to refer to some of the preceding sections. By virtue of the 36th section the assessment is to be fixed exclusive and independent of all existing Lakhiraj lands, that is, lands exempted from the public revenue. Such lands are therefore in effect withdrawn from the settlement, and the Zemindar, though these lands might be locally situate within his district, could claim no title therein by virtue of the settlement.

Sections 37 to 40 deal with certain lands referred to as "private lands" of the Zemindars. By section 37 these are not to be included in the Lakhiraj lands referred to in section 36, and special directions with regard to them are given in sections 38, 39 and 40. Speaking generally, such lands are not excluded from, but on the contrary are included in, the settlement. Then comes the 41st section dealing with Chakran lands; these, whether held by public officers or private servants in lieu of wages are also not to be included in the Lakhiraj lands referred to in section 36. They are to be annexed to the Malguzari lands and declared responsible for the public revenue assessed on the Zemindaris in which they are included in common with all other Malguzari lands therein.

Sections 37 to 41 inclusive appear to their Lordships to suggest that neither the "private lands" of the Zemindars nor Chakran lands had theretofore been taken into account in fixing the revenue for

(1) (1869) 12 M. I. A. 289 (331). (2) (1864) 10 M. I. A. 16.

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which the Zemindar was responsible to Government. Otherwise there would be no point in excluding them from the Lakhiraj lands dealt with by section 36. However this may be with regard to the private lands of the Zemindar or with regard to Chakran lands, the services for which were purely personal to the Zemindar, it is quite clear that Tannahdari and Chowkidari Chakran lands, the services for which involved the performance of duties in which the public was interested, had not, as a rule, been taken into account for the purpose of increasing the jumma.

The effect of section 41 appears to be this : The question whether any of the Chakran lands therein referred to ought to be taken into account for the purpose of increasing the jumma is left to be determined by the custom which had hitherto prevailed or any special directions contained in the regulations. But whether or not so taken into account, all Chakran lands are to be considered Malguzari for the purpose of ascertaining the lands in respect of which the jumma is paid and upon which it is secured. The *prima facie* title of the Zemindar to Chakran lands within his district is thus recognised by the settlement. Tannahdari Chakran lands may be resumed under Regulation I, section 8, clause 4, but with regard to all other Chakran lands, if resumable at all, they can be resumed by the Zemindar alone. In the case however of Chowkidari Chakran lands, not even the Zemindar may be entitled to resume them, for Chowkidars have public duties to perform and the lands which they hold on service tenure as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes. Subject, nevertheless, to the requirements of the public interest, the Zemindar is the owner and as such is entitled to the enjoyment of any personal services which the Chowkidars ought to render and when vacancies occur to appoint others in their place. All this follows from what was said by Lord Kingsdown in *Joykishen v. Collector of East Burdwan* (1).

Such, then, being the Zemindar's interest in Chowkidari Chakran lands within his district, it is difficult to see why this interest should not be made the subject of a putni grant. That it could be so made appears to have been admitted in the last-mentioned case, and the whole of Lord Kingsdown's judgment proceeds on that footing. In their Lordships' opinion, there can be no reasonable doubt on this matter. Indeed, the only argument to the contrary advanced by the appellant's counsel was based on certain expressions used by Mr. Ameer Ali in giving the reasons of the Board in the recent case

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of *The Secretary of State for India* v. *Kirtibas Bhupati Hari-Chandan Mahapatra* (1). In that case, which has little, if any, bearing on the questions now in controversy, the point for decision was whether the power of resumption conferred by Act VI of 1870 extended to certain Chakran lands which the Government had affected to resume thereunder. Here it is admitted by everyone that the powers of the Act were applicable. Moreover, it is abundantly clear that Mr. Ameer Ali, whatever expressions he used, did not intend to depart in the smallest degree from what had been laid down by Lord Kingsdown in *Joykishen* v. *Collector of East Burdwan* (2). Under these circumstances, any argument based on a meticulous examination of isolated expressions used by him can, in their Lordships' opinion, have little weight.

It remains to consider the effect of a resumption by the Government of chowkidari Chakran lands under the provisions of Act VI of 1870 of the Bengal Council.

It should be observed that the definition of Chowkidari Chakran lands contained in the Act refers not only to the public duties of chowkidars, but also to their personal duties to the zemindar. It is apparently for this reason that the revenue assessment in the lands resumed is, by section 49, fixed at only one-half of the annual value of such lands. If the zemindar had no interest, the effect of this provision would be to make him a free gift of half of the value of the lands resumed. It appears to be for the same reason that the zemindar is, under section 50, entitled to contest the correctness of any assessment which is made. After the assessment is complete the collector is, under section 50 by order in the scheduled form, to transfer the land to the zemindar subject to the assessment. By the 51st section such order operates to transfer the land to the zemindar subject to such assessment and "subject to all contracts theretofore made in respect of, under or by virtue of which any person other than the zemindar may have any right to any land, portion of his estate, or tenure in the place in which such land may be situate." The latter words may not be very happily chosen, but their obvious intention is to preserve the rights of third parties. They contemplate a case in which the village in which the resumed lands are situate has been made the subject of a contract by the zemindar, or those through whom he claims and that under this contract some third party may have an interest in the lands resumed. They are wide enough to include, and in their Lordships' opinion do include, the rights of a Putnidar

(1) (1914) L. R. 42 I. A. 30; 21 C. L. J. 31. (2) (1864) 10 M. I. A. 16.

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under a Putni grant by virtue of which the Putnidar is lessee of the zemindar's interest in the lands resumed, and also the rights of a Dar-putnidar under a Darputni grant. In their Lordships' opinion, therefore, not only does the Act recognise the existing title of the zemindar to the lands resumed, but the estate taken by the zemindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the zemindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under these contracts are preserved. It is a satisfaction to their Lordships to find that the view above expressed is that hitherto almost universally adopted in the Indian Courts.

The result is that the appeal fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly. With regard to costs, the appellant should pay to the respondents who have appeared one set of costs between them, but these should, having regard to the terms on which leave to appeal was granted, be as between solicitor and client.

Downer & Luson:—Solicitors for the Appellants.

Watkinson & Hunter:—Solicitors for the Respondent Panchanani Dasi.

G. C. Farr:—Solicitor for Rani Mina Kumari Saheba.

J. M. P. *Appeal dismissed.*

PRESENT: *Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.*

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MINA KUMARI BIBI

v.

RAJA BIJOY SINGH DUDHURIA.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Civil Procedure Code (Act XIV of 1882), sections 274, 276 and 295—Attachment in execution of a decree—Sale by judgment-debtor of attached property—Subsequent attachment and sale of same property in execution of another decree—Rights of the private purchaser and the execution purchaser who held both decrees—Transfer of Property Act (Act IV of 1882), section 53—Preferential payment to a creditor not fraudulent.

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The respondent, who was the transferee of two decrees dated 1896 and 1901 respectively, obtained, in execution proceedings (Case No. 8 of 1902) in connection with the first decree, an order of attachment under section 274 of the Code of Civil Procedure, 1882, of certain properties belonging to the judgment-debtor, but by an order, dated the 20th March 1905, sale of the attached properties was indefinitely postponed, and on the 29th March 1905 the execution application was dismissed with the respondent's consent. On the 15th July 1907, the judgment-debtor conveyed the said properties to the appellant by two sale deeds. On the 26th July 1907, the respondent made another application for execution (Case No. 19 of 1907) of the decree of 1896, and in spite of the judgment-debtor's opposition it was held that this application was in continuation of the former proceedings and that the properties were still under attachment. On the 16th July 1907, the respondent applied for execution (Case No. 16 of 1907) of the decree of 1901. In these proceedings the said properties were attached, and notwithstanding the appellant's opposition they were sold in execution and purchased by the respondent decree-holder, who obtained possession thereof. The appellant sued for recovery of possession of the same:

Held, that though the word 'attachment' occurred three times in section 276 of the Code of Civil Procedure, 1882, the reference was to one, and only one, attachment and that one in the present case was the attachment in case (No. 16 of 1907), on which the respondent's title rested; that the sale to the appellant being prior to the date of that attachment was not void; and that the appellant's suit must be decreed.

Held, also, that all that the earlier attachment in Case No. 8 of 1902 could do was to entitle the decree-holder to the benefit of the later attachment in Case No. 16 of 1907, but he could not claim to be in a better position than the decree-holder in the latter case and his position is not strengthened by the fact that it was the same person who was the decree-holder in both cases.

A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases and prefer any creditor he chooses, and even though a debtor has preferred a creditor of set purpose, it would not stamp the transaction as fraudulent.

It is a general though not a conclusive presumption that a document was made on the day of the date it bears.

A Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony.

To bring section 295 of the Code of Civil Procedure of 1882 into play certain conditions are necessary and one of them is that there should be assets held by the Court.

Appeal from a judgment and decree of the Calcutta High Court (Chitty and Teunon JJ.) dated the 26th March 1912, which reversed a judgment and decree of the Subordinate Judge of District Murshidabad.

The main questions for determination on the appeal were (1) whether the properties in dispute were owned by Chhatrapat Singh

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after the 15th July, 1907 or by the appellant in whose favour two conveyances were executed by the said Chhatrapat Singh on the 15th July 1907, and (2) whether an auction sale at which the respondent purchased the properties was liable to be set aside. The facts which give rise to the litigation are fully stated in their Lordships' judgment. The respondent held two decrees against Chhatrapat Singh, dated the 24th August 1896 and 3rd January 1901. The respondent took out execution (Case No. 8 of 1902) of the first decree and the properties in dispute were attached and the writ of attachment was duly served on the 21st July, 1902. Certain persons then put forward claims to the attached properties and the claims were decided finally by the High Court on the 27th February 1907, and it was held that the judgment-debtor Chhatrapat Singh was the owner of the properties. The respondent then proceeded to execute the second decree dated 3rd January, 1901. He applied for execution (Case No. 16 of 1907) on the 16th July, 1907. On the 28th September 1907, the appellant Mina Kumari laid a claim to the attached properties urging that the properties had been sold to her by the judgment-debtor on the 15th July, 1907. The District Judge rejected the claim and the properties were sold and purchased by the respondent and the sale was duly confirmed. The appellant brought the present suit to recover possession of the properties. The Subordinate Judge found all the material issues in favour of the plaintiff. He found that the judgment-debtor owed a debt to the plaintiff and that in payment of that debt the properties were sold to the plaintiff on the 15th July 1907 and that it was not proved that the properties were under attachment on the date of her purchase. He accordingly allowed the plaintiff's claim. The High Court came to the opposite conclusion on the evidence. It held that the sale deeds were ante-dated after the attachment made in 1907 and that the judgment-debtor continued to be the real owner of the properties and therefore dismissed the suit. Hence this appeal.

Upjohn K. C., and *Sir W. Garth* for the Appellant submitted that the findings of the trial Judge were right. The grounds on which the High Court based their judgment were not raised in the written statements nor in the issues and were not suggested in cross-examination to any of the plaintiff's witnesses. The evidence produced by the plaintiff established that the conveyances were in fact executed on the 15th July, 1907, and the case that they were ante-dated was not made by the defence before the trial Judge. The fraud pleaded by the defence was that the judgment-debtor did not owe any debt to the plaintiff, but that was proved against

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the defence and that finding was admitted to be correct. The High Court erroneously acted on a case which was never pleaded nor proved. The respondent's case ought to have been put to the other side : *Bal Gangadhar Tilak* v. *Shriniwas* (1).

De Gruyther K. C., and *Dube* for the respondent submitted that the sales to the plaintiff were collusive and fictitious and that there was evidence upon the record on which the High Court was justified in holding that the sale deeds had been ante-dated. Further the properties were under attachment since July 1902 and the attachment was subsisting on the 15th July, 1907.

(*Upjohn* contended that the point was not open to the respondent as it was not pressed by his counsel before the High Court.)

The point was raised in the written statement and the grounds of appeal to the High Court. An abandonment of a question of law by the legal advisers of a party would not preclude that party from arguing the point. Reference was made to the following: *Maharani Beni Koeri* v. *Dudh Nath* (2).

(Their Lordships ruled that they would hear the point raised).

Under section 276 of the Code of Civil Procedure, 1882, the sales to the plaintiff were void against all claims enforceable under the attachment. The respondent's claim under the first decree dated 24th August 1896 (execution case No. 8 of 1902) was enforceable under section 295 of the Code and therefore enforceable under section 276. It was proved that the respondent had applied for rateable distribution of the proceeds of the sale. Reliance was placed on *Sorabji* v. *Govind Ramji* (3). That was the correct interpretation of sections 276 and 295 of the Code and is now embodied in the new Code of 1898, section 64.

Upjohn in reply : As to the point of law (their Lordships having intimated that they did not desire to hear counsel for the appellant on the facts) the attachment in section 276 which has the effect of avoiding a private alienation of the property must be an attachment under which the respondent claims title. The attachment in the present case was admittedly made after the 16th July, 1907. Section 295 has no application. The attachment in Case No. 8 of 1902 would be operative if the attachment in case No. 16 of 1907 were good and valid. The decree-holder in the earlier attachment could not be in better position than the one in the later attachment.

(1) (1915) L. R. 42 I. A. 135 (146); 22 C. L. J. 1; I. L. R. 39 Bom. 441.
(2) (1899) L. R. 26 I. A. 216 (221); I. L. R. 27 Calc. 156.
(3) (1891) I. L. R. 16 Bom. 91 (95).

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In any view the earlier execution and attachment had been abandoned long ago and the previous attachment ought not to be regarded as subsisting on the 15th July, 1907.

The judgment of their Lordships was delivered by

Sir Lawrence Jenkins :—This is a suit for the possession of immovable property brought by a purchaser under a private alienation against a purchaser at an execution sale, who was also the decree-holder, and against the judgment-debtor. There was also originally another defendant, but he has since died and is now represented by the decree-holder.

The suit was decided in the plaintiff's favour in the Court of the Subordinate Judge at Berhampur, but on appeal it was dismissed with costs by the High Court of Calcutta. From the High Court's decree the present appeal has been preferred to His Majesty in Council.

The judgment-debtor is Chhatrapat Singh Dugar, who is not inexperienced in litigation. Two decrees were passed against him in the High Court of Calcutta on its original side, one on the 24th August, 1896, in suit 449 of 1896, the other on the 3rd January, 1901, in suit No. 302 of 1900. The defendant, Raja Bijoy Singh Dudhuria, the purchaser at the execution sale, was a transferee of both decrees, and so became the decree-holder under each.

It will be convenient to trace briefly the history of these decrees, both of which were sent for execution to the Court of the District Judge of Murshidadad.

On the 13th June, 1902, an application was made at Murshidabad by the decree-holder, for execution of the decree of 1896, and the proceedings became execution case No. 8 of 1902.

On the 12th July, 1902, an order of attachment was made under section 274, Civil Procedure Code, prohibiting the judgment-debtor from alienating the property there specified until any other order should be passed by that Court.

The proceedings were protracted by adverse claims, but ultimately on the 29th March, 1905, the following order was recorded: "Nothing further can be done in this case at present. The application for executon is accordingly dismissed with the consent of the decree-holder. Certify result to the High Court, Original Side."

Though this does not appear on the record, it may be assumed that the Murshidabad Court certified the result to the High Court, in accordance with the provisions of the Code (section 223).

On the 26th July, 1907, another application, No. 19 of 1907,

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was made to the Murshidabad Court for execution of the decree of 1896, and here, too, it may be assumed that an order was made by the High Court for the transmission of the decree. The order made on the application was, "Now issue warrant of attachment. Returnable on 16th August."

On the 29th July, 1907, at the decree-holder's instance, the issue of the warrant of attachment was stayed, and a direction given for the issue of notice to the judgment-debtor to show cause, on the 16th August, why the properties should not be advertised for sale.

On the 16th August the decree-holder applied for the issue of a sale proclamation, "the attachment being taken to have subsisted since the order passed on the 27th March, 1905, on his previous application for sale of the same properties ...... Previous to that order there had been an order passed on the 20th March, 1905, directing that the sale of the [other] property now for sale here is postponed indefinitely."

Notwithstanding Chhatrapat's opposition, the District Judge held that the application 19 of 1907 must be received as one in continuation of the former proceedings, that the properties were still under attachment, and that a sale proclamation might issue without the property again being attached. Though on the face of things it seemed no real concern of his, still Chhatrapat appealed, but the order was affirmed by the High Court. So much, then, for the proceedings under the decree of 1896.

Under the other decree, that of 1901, an application for execution, No. 16 of 1907, was made by the decree-holder on the 16th July, 1907, in the Murshidabad Court. Notice was issed, and on the 29th July, 1907, an order was made for the issue of a warrant of attachment. On the 23rd August, 1907, attachment was effected. A claim was preferred by the present plaintiff, but the property was sold in execution, notwithstanding her opposition, the purchaser being the decree-holder, in whose favour an order had been made allowing the purchase money to be set off against the decretal amount, which was considerably in excess of the price.

The private alienation under which the plaintiff derives title was effected by two sale deeds expressed to be executed in her favour on the 15th July, 1907, by the judgment-debtor. The question in this litigation is which of the two titles is to be preferred, the plaintiff's or the decree-holder's.

The plaintiff alleges that hers is the earlier, and that the judgment-debtor had no right, title, or interest in the property in suit at the date of the attachment in execution case No. 16 of 1907, under

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which the decree-holder bought. The plaintiff also questions, with certain exceptions, the identity of the property in the two sales, but in the view their Lordships take, this topic need not be pursued. The decree-holder denies the plaintiff's priority of title, and contends that the assurances to her were collusive and fictitious; that the sale deeds, though purporting to be of a date prior to the attachment in execution case No. 16 of 1907, were in truth executed later; and that in any case the private alienation to the plaintiff was during the continuance of an attachment, and therefore void.

First, then, as to the alienation in favour of the plaintiff being, as it is termed in the respondent's case, collusive and fictitious. It is there alleged that "the judgment-debtor, Babu Chhatrapat Singh, was, and always remained, the real owner of the properties in dispute." Strictly this means that the transaction was benami and not that it was a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act. The difference is distinct, though it is often slurred. To the suggestion that the transaction was benami, a complete answer is furnished by the admission that the judgment-debtor owed the plaintiff the amount stated to be the consideration for the sale deeds and more.

And even if the case for the decree-holder be treated as raising the further plea of a fraudulent transfer, this same admission operates strongly in the plaintiff's favour.

It may be that the judgment-debtor preferred the plaintiff, with whom he was connected by family ties, and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer. A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases, and prefer any creditor he chooses. And whatever may be suspected, and however slender the confidence that Chhatrapat may inspire, there is no evidence on which any fraudulent intention can be imputed to the plaintiff.

Had it been made out that the sale deeds to the plaintiff were really executed after the attachment in execution case 16 of 1907, then there would have been justification for a finding of fraud; though in that case the finding would have been unnecessary, for the plaintiff's title would have been defeated, apart from fraud, under the express terms of section 276 of the Civil Procedure Code.

But the contention that the sale deeds were antedated cannot be sustained. It is a general, though not a conclusive presumption that a document was made on the day of the date it bears, so that

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for what it is worth the plaintiff starts with that in her favour; but her case does not rest there, for such oral evidence as there is on the point supports the presumption, and was not seriously challenged by cross-examination. It has been suggested that the plaintiff should have called other witnesses to the date of execution. But her advisers had no reason to apprehend that this contention would be advanced. It is not pleaded in the written statement, it is not raised in the issues, and the judgment of the First Court certainly does not suggest that it was given prominence even at the trial.

There may be ground for suspicion, and Chhatrapat's treatment of his creditors in the past may engender doubt, but the Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony. Such as it is the legal proof here is all on the plaintiff's side, while if indirect signs are sought the keenness which marked the contest as to the continuation of the execution proceedings No. 8 of 1902 is hardly intelligible unless it be assumed that both parties realised the importance of the dates, and the dates could only have possessed importance if the sale deeds had been already executed.

But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas bear, are, nevertheless, void under section 276 of the Civil Procedure Code. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment.

But the decree-holder argues that it was made during the continuance of the attachment in execution case No. 8 of 1902, and in support of this reliance is placed on the order of the District Judge of the 16th August, 1907, which was affirmed on appeal by the High Court.

The plaintiff is not bound by those decisions, and their correctness has been forcibly questioned before their Lordships. But it is unnecessary, and inadvisable to deal further with this point, and more especially as there is another and surer answer to the decree-holder's plea. He relies on section 295 of the Code of Civil Procedure as entitling him to the benefit of section 276, and for this purpose he calls in aid his application for attachment in execution

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case No. 8 of 1902. To bring section 295 into play certain conditions are necessary, and one of them is that there should be assets, held by the Court. It has not been shown that there were such assets, and the indications in the record point the other way. But apart from this, section 295 cannot help the decree-holder. Though the word "attachment" occurs three times in section 276, the reference is to one, and only one, attachment; that one in this case is the attachment in execution case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in *Sorabji* v. *Govind* (1), is correct, and that the conditions of section 295 have been satisfied, it cannot advance the decree-hoder's case.

It still is the attachment in execution case No. 16 of 1907, that is, the only weapon of attack, and it is not made more effective by the earlier attachment in execution case No. 8 of 1902. All that earlier attachment can do in the circumstances of this case is to entitle the decree-holder to the benefit of the later attachment. He cannot claim to be in a better position than the decree-holder in execution case No. 16 of 1907, nor does it strengthen his position that it is the same person who is ths decree-holder in both cases. To claim a higher right because the attachment in execution case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought.

The result then is that the appeal must be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge, so far as it directs that the plaintiff do get khas possession of the properties in suit, restored with costs in both Courts, and any costs paid under the decree of the High Court must be refunded and the costs of this appeal paid by the decree-holder.

And their Lordships will humbly advise His Majesty accordingly.

G. C. Farr:—Solicitor for the Appellant.

Watkins and *Hunter*:—Solicitors for the Respondent.

J. M. P. *Appeal allowed.*

(1) (1891) I. L. R. 16 Bom. 91.

PRESENT: *Lord Atkinson, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.*

HAMIRA BIBI AND OTHERS

v.

ZUBAIDA BIBI AND OTHERS.

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May, 29, 30. June, 1, 2. August, 1.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHBAD.]

Mahomedan Law—Dower—Widow's lien for dower—Deferred dower—Widow in possession—Accounting for profits—Interest.

It is recognised by the British Indian Courts that under the Mahomedan law the widow has a creditor's lien for her deferred dower, that is to say, the unpaid dower ranks as a debt, and the wife is entitled, along with the other creditors, to have it satisfied on the death of the husband out of his estate, but her right is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied.

When a Mahomedan widow is allowed to take possession of her husband's estate in order to satisfy her dower debt with the income thereof, in the absence of an agreement, express or implied that she should not be entitled to claim any sum in excess of her actual dower, she is entitled, on equitable grounds, to reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. In the present case interest was allowed at the rate of 6 per cent. per annum.

The rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussulman law, but are in fact often referred to and invoked in the adjudication of cases.

Hamira Bibi v. *Zubaida Bibi* (1) affirmed. *Woomatul Fatima Begum* v. *Meerunnissa Khanum* (2) approved. *Ram Lal Mookerji* v. *Haran Chandra Dhar* (3), and *Mia Khan* v. *Bibi Bibijan* (4) referred to.

Two consolidated appeals from two decrees of the High Court at Allahabad (August 11, 1910), varying two decrees of the Court of the Subordinate Judge of Gorakpur (September 5, 1906).

The facts are stated in the judgment of their Lordships. The question for determination was whether a Mahomedan widow, who had been put in possession of her husband's estate in lieu of her

(1) (1910) I. L. R. 33 All. 182. (2) (1868) 9 W. R. 318.
(3) (1869) 3 B. L. R. O. C. 130. (4) (1870) 5 B. L. R. 500.

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dower debt, was entitled, when called upon by her husband's heirs, other than herself, to account for rents and profits received by her during the time of her possession, to claim interest at a reasonable rate upon her dower debt. Both Courts in India answered the question in the affirmative, and allowed 6 per cent., interest. For a report of the case before the High Court: See *Hamira Bibi* v. *Zubaida Bibi* (1).

Sir Erle Richards, K. C. and *Dube*, for the Appellants: Those who claim interest upon a debt must show that they are entitled to it either by contract or by law. There was no agreement to pay interest, and the appellants contend (1) that the matter has to be determined by Mahomedan law, under which interest is not recoverable, and (2) that the case is not within the Interest Act (XXXII of 1839). Under Act XII of 1887, section 37 Mahomedan law is to be applied in any question between Mahomedans as to "marriage." That word includes dower, as appears from a comparison of the Act with the Civil Suit Acts of other provinces. The lien is recognised solely because dower is part of the law of marriage. The payment of interest is contrary to the precept of Mahomedan law. The widow's lien in respect of her dower is on the same footing in Mahomedan law as that of any other creditor who has obtained possession as security. It extends only to the principal and to well-recognised expenses of management; as soon as those are discharged out of the receipts it ceases: Macnaghten's Principles of Mahomedan Law, 1897, Ed. Chapter II, article 16, p. 74, Baillie's Digest 1875, Ed. pages 776, 781, 801, 802; Hamilton's Hedaya, Vol. 4 Book 48, page 99. The Mahomedan Law against interest is not abrogated by the Usury Act (XXVIII of 1855). The view of Phear J. to the contrary in *Mia Khan* v. *Bibi Bibijan* (2) is opposed to that of Peacock C. J. in *Ram Lal Mookarjee* v. *Haran Chandra Dhar* (3). Lien for dower has been dealt with by the Board in three decisions, but no question as to interest was raised: *Ameeroon-nissa* v. *Mooradoon-nissa* (4), *Nawab Mahomed Ameenoodeen* v. *Moozuffur Hossein* (5), *Beebee Bachun* v. *Sheikh Hamud Hossein* (6). The unreported case referred to in the judgment of the High Court supports the appellants. The interest Act does not apply since the dower was not payable under an instrument in writing. Interest cannot be recovered as damages except where that Act applies:

(1) (1910) I. L. R. 33 All. 182. (2) (1870) 5 B. L. R. 500.
(3) (1869) 3 B. L. R. O. C. 130 (135). (4) (1855) 6 M. I. A. 211.
(5) (1870) 5 B. L. R. 570. (6) (1871) 14 M. I. A. 377.

London and Chatham and Dover Ry. Co. v. *South Eastern Ry. Co.* (1); *Juggomohun* v. *Kaisreechund* (2). The rules of equity as applied in England to a charge upon land have no application in this case, which depends upon Mahomedan law. The result of the Indian authorities is that interest cannot be allowed upon money lent in India unless it appears from the bond that it was the intention of the parties that interest should be payable: *Mansab Ali* v. *Gulab* (3). Interest upon dower was allowed in *Soorma Khatoon* v. *Attaff-oon-nissa Khatoon* (4) and in *Hubbeb-oon-nissa Khatoon* v. *Shumsoodan Ahmed* (5) but it was allowed under the Interest Act; in the latter case from the date of suit only, the plaint being treated as a demand under the Act. *Woomatool Fatima Begum* v. *Meerunmun-nissa Khanum* (6) was wrongly decided.

De Gruyther, K. C., and *Abdul Majid*, for the Respondents: Prior to British rule Moslem Civil Tribunals in Bengal recognised loans at interest among Mahomedans and were not bound by texts prevalent at Baghdad. Anglo-Mahomedan law has consistently treated the Mahomedan prohibition against taking interest as a moral precept and not as legally enforceable: *Mia Khan* v. *Bibi Bibijan* (7). Wilson's Anglo Mahomedan Law, 4th edition, page 28. There is no text in the Mahomedan law books which makes a widow liable for mesne profits, or which provides for an account; accounting is a creation of British law, and should be ordered according to equitable principles. Mahomedan law recognises equitable principles and does not preclude the Court from allowing a widow compensation for her loss of interest upon the unpaid dower debt. The decision in *Woomatool Fatima Begum* v. *Meerunmun-nissa Khanum* (6) is directly in the respondent's favour. That decision was followed in *Sabuchjan Bewa* v. *Ansaruddin* (8) and there is no reported authority to the contrary. Interest upon dower debt was allowed in *Soorma Khatoon* v. *Attaf Khatoon* (4) and in *Habeeb-oon-nissa Khatoon* v. *Shumsoodan Ahmed* (5) it does not appear that it was allowed under the Interest Act. The matter is not provided for by Mahomedan law, and under Act XII of 1887, section 37, sub-section 27 the Court should act according to justice, equity and good conscience; *Mullick Abdool Guffour* v. *Muleka* (9).

(1) (1893) A. C. 429.
(2) (1862) 9 M. I. A. 256.
(3) (1881) I. L. R. 10 All. 85 (90).
(4) (1863) 2 Hay 210.
(5) (1860) S. D. A. 311.
(6) (1868) 9 W. R. 318.
(7) (1870) 5 B. L. R. 500.
(8) (1911) I. L. R. 38 Calc. 475 (482).
(9) (1884) I. L. R. 10 Calc. 1112.

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Dube replied : Under Mahomedan Law a creditor is not entitled to any advantage for forbearing to sue : Baillie's Digest 1875 Ed. page 78. Accounting for mesne profits by a pawnee creditor was well known to Mahomedan law ; the Hedaya provides for it in terms. A widow is liable to account for all her receipts except expenses of maintaining the property : *Ramzan Ali* v. *Ashgavi* (1) ; *Ahmed Hossein* v. *Khodeja* (2).

The judgment of their Lordships was delivered by

August, 1.

Lord Parker of Waddington :—A short statement of the facts which have given rise to this litigation will explain the point for determination involved in these consolidated appeals.

One Shaikh Inayat Ullah, a Mahomedan inhabitant of the district of Gorakhpur, in the United Provinces of India, died in March 1892, leaving him surviving a widow and daughter, named respectively Zubaida Bibi and Najm-un-nisa ; a sister, Hamira Bibi ; and two brothers, Khadim Hossain and Ihsan Ullah, all of whom became entitled under the Sunni law, to which Inayat Ullah was subject, to certain specific shares in his estate. Besides the widow's share of one-eighth, Zubaida was entitled to her unpaid dower. This has been found in a previous proceeding to have amounted to the large sum of one lakh of rupees. The other heirs of Inayat Ullah not being in a position to pay this sum without apparently alienating at least a considerable part of the estate, allowed the widow to take or remain in possession of the whole to satisfy her claim out of the rents and issues of the landed property. It is not clear whether the widow was let into possession in the lifetime of Inayat Ullah or after his death. But it is not disputed that since 1892 Zubaida has been in possession.

In 1902, the other heirs of Inayat Ullah brought a suit against her to recover possession of their shares. Their action was dismissed on the ground that it was misconceived inasmuch as it was not a suit for the purpose of taking accounts, and thus ascertaining what portion of the dower-debt was then unsatisfied. The present suits were instituted with that object on the 15th March, 1906, in the Court of the Subordinate Judge of Gorakhpur, one by Hamira Bibi and the other by the widow and sons of Khadim Hossain who had died either before or after the suit of 1902. The reliefs prayed for in both actions were the same, viz. (a) for the taking of accounts ; (b) for decree to plaintiffs of their respective shares in case the

(1) (1910) I. L. R. 32 All. 563.
(2) (1868) 10 W. R. 369.

dower-debt was found to be discharged; and (c) for an award to the plaintiffs of any sum found to have been received by her in excess of her dower. Zubaida in her defence among other pleas set up a claim for interest on her unpaid dower; she alleged that the income of the property was less than the interest she claimed; that, consequently, the debt was still unsatisfied and that the plaintiffs were accordingly not entitled to recover possession of their shares in Inayat Ullah's estate.

The Subordinate Judge, who tried the case in the first instance, considered the defendant was entitled to interest at 6 per cent. per annum on her dower; that the interest thus calculated exceeded the annual net income from the estate, and that, therefore, it was clear no portion of the debt was discharged. In the result, he dismissed both suits. On appeal to the High Court at Allahabad, the learned Judges took the same view as to the right of the widow, Zubaida, to receive interest; but they varied the decrees of the Court of first instance with regard to the total dismissal of the suits; they made a declaration that the plaintiffs should recover possession of their respective shares in the estate provided they paid to the defendant their quota of the dower-debt proportionate to such shares, which quota the learned Judges specified.

From these decrees of the Allahabad High Court the plaintiffs have appealed to his Majesty in Council, and the sole question for determination is whether the defendant Zubaida is entitled to any interest or compensation in respect of her dower unpaid at the time of Inayat Ullah's death. The case has been elaborately argued on both sides and a large number of authorities have been cited. On behalf of the plaintiffs it has been argued with considerable force that the Mussulman law prohibits usury and usurious dealings between Moslems; that dower is a liability springing under the provisions of that law from the status of marriage; and that, therefore, all incidents and rights connected therewith must be subject to the Mussulman law. It was further contended that the Mahomedan widow's lien on the husband's estate for unpaid dower is the only creditor's lien which has been recognised and maintained intact by British Courts of Justice, and that it ought not to be extended beyond what the Mussulman law itself permits by allowing interest when it is not contracted for. On the other side it is argued that the Mahomedan law prohibiting usury has been repealed in India by Act XXVIII of 1855, and that consequently there is no bar to Mussulmans receiving or paying interest, and that the practice of receiving interest is common among them both

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in India and other countries. It is further urged that, in any event, the widow is entitled to some interest by way of damages for non-payment of dower at the due time.

In the view their Lordships take of the case it is unnecessary in their opinion to examine much of the argument addressed to the Board or to discuss the numerous cases cited at the Bar.

There is a conflict of judicial opinion in India on the question whether the Mussulman rule relating to usury was or was not abrogated by Act XXVIII of 1855. Sir Barnes Peacock, C.J., sitting with Mr. Justice Macpherson held, in the case of *Ram Lal Mookarjee* v. *Haran Chandra Dhar* (1) that it was not. "Hindu law," he said, "did certainly as between Hindus restrict the rate of interest to be charged; and I do not think that Act XXVIII of 1855 was ever intended to repeal the Hindu or Mahomedan law as to interest." Then after reciting the preamble of the Act, he added as follows: "That Act" (meaning Act XXVIII of 1855) "did no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury." In a later case, *Mia Khan* v. *Manu Khan* (2), Mr. Justice Phear sitting with Markby, J., took a different view. In the ordinary course, on this difference of opinion arising between two Division Benches of the same Court, the case should have been referred to a Full Bench. But Phear, J., did not take that course and decided the point differently, holding that the Act of 1855 had abrogated the Mussulman law prohibiting usury. Their Lordships do not think it necessary to decide on the present occasion which view is right, nor do they think that Act XXXII of 1839 has any application.

Dower is an essential incident under the Mussulman law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called *prompt*, payable before the wife can be called upon to enter the conjugal domicil; the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt, and the wife is entitled,

(1) (1869) 3 B. L. R., O. C., 130.
(2) (1870) 5 B. L. R, 500.

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along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussulman law which has received recognition in the British Indian Courts and at this Board.

When a widow is allowed to take possession of her husband's estate in order to satisfy her dower-debt with the income thereof, it is either on the basis of some definite understanding as to the conditions on which she should hold the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there is no such understanding, and a claim is made as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband. Their Lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. This appears to be consistent with the chapter on "The Duties (*Adab*) of the Kazi" in the principal works on Mussulman law, which clearly shows that the rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases.

In the case of *Woomatool Fatima Begum* v. *Meerunmunnsisa Khanum* (1), the plaintiff, who had held possession of her husband's estate under a lien for dower, was dispossessed by a decree of the Court. She then sued one of the heirs for a proportionate amount of her dower. Among other questions raised, the defendant claimed that the plaintiff must account for mesne profits during the period she held possession. Sir Barnes Peacock, sitting with Jackson and Macpherson, JJ., after remarking that the "plaintiff does not ask to receive interest upon her dower, but she asks that she may not

(1) (1868) 9 W. R. 318.

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be compelled to account for the profits of the land during the term she held it in lieu of her dower," discussed various considerations which led him to think that it would be inequitable to make her account for the profits, except on the terms of allowing her reasonable interest on her dower debt. The annual rents and profits being less than such reasonable interest, the claim for mesne profits was disallowed. Their Lordships think that this was in accordance both with sound sense and with law.

In the present case the Courts in India have allowed the defendant, on taking her accounts, 6 per cent. per annum, by way of equitable compensation.

It was not contended that, if interest by way of compensation were allowed at all, this rate was too high under the circumstances. The contention was that no interest by way of compensation could be allowed at all.

There Lordships are therefore of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Barrow Rogers, & Nevill :—Solicitors for the Appellants.
Douglas Grant :—Solicitor for the Respondents.

J. M. P. *Appeal dismissed.*

PRESENT: *The Lord Chancellor (Lord Buckmaster), Lord Atkinson, and Sir John Edge.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH WESTERN PROVINCES, ALLAHABAD.]

Deeds of sale and repurchase—Construction—Whether sale or mortgage by conditional sale—Test to apply in such a case—Duty of the Court when asked after a long time, e.g., 30 years, to hold that a document is not what it purports to be.

Two instruments were executed in writing, one a deed, dated the 29th August 1852, executed by the appellant's predecessor in title purporting to be a deed of absolute sale of certain properties, and the other a deed of agreement dated the 5th September 1852, executed by the predecessors in title of the respondents, reserving to the vendors a right to repurchase the property sold on repayment of the original purchase money within 10 years. The question was whether the two documents taken together constituted a mortgage by way of conditional sale

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of the property sold or an absolute sale of it with an agreement for repurchase. The two deeds were separately stamped and registered on different dates. The vendors never availed themselves of the condition of repurchase and the appellant sued in 1907 for redemption. The parties to the suit were Mahomedans:

Held, that the intention of the parties which was the test in such a case must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances, and that on that principle the decision of the High Court should be affirmed, that the transaction was an out and out sale and not a mortgage by conditional sale.

Bhagwan Sahai v. *Bhagwan Din* (1) followed.

Balkishen Das v. *Legge* (2) distinguished.

Alderson v. *White* (3) referred to.

Held, also, that the provision of a bond executed by the parties of even date with the sale deed refuted the suggestion that any of the parties to the sale deed had any religious scruples against the receipt or payment of interest on money lent, or that when desiring and intending to create a mortgage they would have adopted special methods of conveyancing to conceal the fact that interest for the loan was in fact, to be given and received ; *Jhanda Singh* v. *Wahid-ud-Din* (4) affirmed.

With reference to a remark by Lord Cranworth, L. C., in the last mentioned case that "I think a Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be", their Lordships, commenting on the facts that the period of 10 years fixed for repurchase expired in 1863, that the suit was instituted in 1907, forty-four years after the lapse of that period, that the judgment appealed from was delivered in March 1910-11 and that the record was not received at the Privy Council Office till the 25th February 1915, and the appeal was not set down for hearing until June 1916, said "litigation so prolonged becomes an instrument of oppression, is discreditable to any judicial system, and every effort should be made to correct the abuse."

Appeal from certain judgments and a decree of the High Court of Judicature for the North Western Provinces, dated the 22nd March 1910, and 11th March, 1911, on an appeal from a judgment and decree of the Additional Judge of Meerut, dated the 27th March, 1908.

The question for determination on this appeal was as to whether a deed of sale of certain land, dated the 29th August, 1852, and a deed of agreement by the vendees to resell the same to the vendors upon conditions, dated the 5th September, 1852, should be held to be a mortgage by conditional sale, with a right of redemption.

On the 29th August, 1852, the predecessors in title of the plaintiff-appellant executed a deed of sale of Mauza Murlipur Phul in favour of the predecessors in title of the defendants-respondents.

(1) (1890) L. R. 17 I. A. 98; I. L. R. 12 All. 387.
(2) (1899) L. R. 27 I. A. 58; I. L. R. 22 All. 149.
(3) (1858) 2 De Gex. & J. 97 (105).
(4) (1911) I. L. R. 33 All. 685.

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It purported to be an out and out sale of the whole property for a sum of Rs. 5,500.

On the 5th September, 1852, the said vendees executed a deed of agreement in favour of the said vendors agreeing to resell to them the said property, if the latter repaid to them Rs. 5,500 at any time within ten years, and they undertook in that event to execute a sale deed in favour of the vendors.

The sale deed of the 29th August, 1852, was registered on the 18th May, 1853, and the deed of agreement on the 5th September, 1852, on the 19th May, 1853.

On the 29th August, 1852, the said vendors also executed a mortgage of another property of theirs, mauza Jatauli, in favour of the said vendees to secure the repayment of a sum of Rs. 2,500 borrowed by them with interest at the rate of 6 annas per cent. per mensem. In the said mortgage deed the fact of the sale of mauza Murlipur Phul for Rs. 5,500 was recited.

No steps were taken by the said vendors to give effect to the said agreement of the 5th September, 1852.

On the 5th October, 1907, the plaintiff-appellant and the 52nd and 53rd respondents instituted the present suit against the said defendants-respondents for the redemption of the said mauza, on the allegation that the said sale deed of the 29th August, 1852, and the agreement of the 5th September, 1852, constituted a mortgage by conditional sale.

The said defendants-respondents denied that any relation of mortgagor or mortgagee existed between them and the plaintiffs in respect of the said transaction. They alleged that the deed of the 29th August, 1852, was an absolute sale to them of the property in question, and that the agreement of the 5th September, 1852, was a new and entirely independent transaction, entered into by the vendees as a conditional concession and purely as an act of kindness.

The Subordinate Judge held that the facts and circumstances showed that the deed of sale of the 29th August, 1852, was intended to be, and was what it purported to be, an out and out sale of the property, that there was no objection as alleged on the part of the said vendees to lending money on a mortgage as was evidenced by the mortgage bond of the same date—that the agreement of the 5th September, 1852, for resale was a separate and independent transaction from the sale, that terms and conditions thereof had never been complied with and it had lapsed, and that no mortgage as alleged had been established. The suit was accordingly dismissed.

On the plaintiff's appeal to the High Court the Chief Justice agreed with Subordinate Judge, but his colleague took a different view. The decree appealed from was therefore affirmed. On further appeal to the High Court by the plaintiffs under section 10 of the Letters Patent, three learned Judges upheld the decisions of the Chief Justice and the Subordinate Judge, and dismissed the appeal.

The plaintiff thereupon appealed to His Majesty in Council.

De Gruyther K. C., and *B. Dube* for the Appellant contended that on the true construction of the two documents of 29th August, 1852, and 5th September, 1852, the deed of sale and the agreement were parts of one and the same transaction, and the two together constituted a mortgage by way of conditional sale. The question was, what was the intention of the parties, who were Mahomedans and by their religion prohibited from taking interest in their business transactions. The form of mortgage by conditional sale was introduced by Mahomedan conveyancing as a mode by which the prohibition against taking interest was virtually complied with by putting a mortgagee in possession as in absolute sale and allowing him to take the profits derived from the property instead of interest on the money lent to the mortgagor but providing for the repurchase of the property by the mortgagor in a stated time. If the same provisions as were contained in these two documents had been put into one document it would, it was submitted, have been properly construed as being a mortgage by conditional sale (see section 58 of the Transfer of Property Act (Clause E) and the fact that two documents, practically contemporaneous, though not registered at the same time were employed ought to make no difference in that construction, which under the circumstances could be fairly presumed to have been the intention of the parties. The provisions in the later deed (5th September, 1852) as to the repayment of the money (5,500 rupees) mentioned in the earlier deed, by the vendors after 9 or 10 years out of their own pockets, was more consistent with the whole transaction being a mortgage than a contract for resale : and the further provision that in case of refusal to reconvey the property the vendors might deposit into the treasury of the Court the amount of the consideration in the sale deed &c.", also showed that the parties intended the transaction to be a mortgage as specified in the Reg. I of 1798, and Reg. XVII of 1806 section 7. Reference was made to *Balkishen Das* v. *Legge* (1) which was relied upon as being a case similar to, and governing the present

(1) (1899) I. L. R. 22 All. 149 (159); L. R. 27 I. A. 58 (67, 68).

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one. The case of *Bhagwan Sahai* v. *Bhagwan Din* (1) was distinguished; and reference was also made to *Ali Ahmad* v. *Rahmatullah* (2) and *Forbes* v. *Ameeroonissa* (3) and *Abdullah Khan* v. *Basharat Husain* (4). The appellant, it was submitted, was entitled to redemption.

A. M. Dunne for the Respondents was not called upon.

The judgment of their Lordships was delivered by

July, 27.

Lord Atkinson :—This is an appeal from a judgment and decree dated the 11th March, 1911, of the High Court of Judicature for the North-Western Provinces, affirming the decree dated the 27th March, 1908, of the Additional Judge for Meerut.

The question for decision is whether two instruments in writing, the first, a deed dated the 29th August, 1852, executed by the appellant's predecessors in title, and the second, an agreement dated the 5th September, 1852, executed by the predecessors in title of the principal resp ondents constituted when taken together a bai-bil-wafa mortgage of the property in the first-mentioned instrument described, that is, a mortgage by way of conditional sale, or an out-and-out sale of the property with a contract for repurchase. The Additional Judge of Meerut held that the documents constituted the latter. On appeal to the High Court, the two members who constituted the Court, Sir John Stanley, Chief Justice, and Mr. Justice Banerji, were divided in opinion : the Chief Justice concurring with the Additional Judge, and Mr. Justice Banerji holding that the transaction amounted to a mortgage by way of conditional sale. Owing to this division of opinion the decree of the Court below stood, and by decree dated the 22nd March, 1910, was affirmed, and the appeal dismissed, but without costs.

An appeal was then brought from this decree of the High Court under section 10 of Letters Patent of that Court to three Judges. They were unanimously of opinion that the decision of the Additional Judge was right, and by their decree of the 11th March, 1911, affirmed the decree appealed from and dismissed the appeal with certain costs. Of the six Judges, therefore, who considered the case five formed the opinion that the transaction effected by these two instruments was an absolute sale out and out of the property mentioned in the deed of the 29th August with a contract for repurchase, and one that the transaction was a mortgage. It was not disputed

(1) (1890) I. L. R. 12 All. 387 (390); L. R. 17 I. A. 98 (100).
(2) (1892) I. L. R. 14 All. 195.
(3) (1865) 10 M. I. A. 340 (348-351); 5 W. R. P. C. 47.
(4) (1912) I. L. R. 35 All. 48 (56); L. R. 40 I. A. 31 (36).

that the test in such cases is the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. The deed of the 29th August, 1852, sets forth that the vendors have sold to the vendees the entire biswas Zemindari property in Mauza Phul with all the rights and interest appertaining thereto under Mahomedan Law, for a sum of 5,500 rupees, and that the vendees have purchased this property from the vendors in consideration of that amount; that the sale is valid, legal, and enforceable; that the vendors have received the consideration for the sale and have put the vendees into the possession and enjoyment of the property with its cesses and revenues; and that they, the vendors, have no longer, as against the vendees, any right title or claim to this property, or to the purchase money in respect of it.

This deed upon its face purports to be an absolute deed of sale. It does not refer to any contemplated or antecedent agreement of resale or repurchase, and does not disclose any intention whatever to treat the disposal of the property mentioned in it as anything other than an absolute transfer on sale for a certain definite sum.

The next document executed by the same parties is a so-called bond, dated on the same day, the 29th August, 1852. It commences by reciting that besides receiving 5,500 rupees the consideration of Mauza Murlipur Phul Pergana, Meerut, as entered in the sale deed dated the 29th August, 1852, they had borrowed from the vendees named in that instrument a sum of 2,500 rupees, and had appropriated the same. The borrowers then covenant that they will pay this sum on demand with interest at the rate of o. 6. o rupee per cent. per mensem. It then sets forth that to secure the debt the borrowers had hypothecated the whole zemindari property in Mauza Jatauli, and that until the sum borrowed be paid they would not by sale, mortgage, or otherwise alienate the hypothecated property.

In the face of the provision of this bond it is idle to pretend that any of the parties to the sale deed of the same date had religious scruples against the receipt or payment of interest on money lent, or that, when desiring and intending to create a mortgage, they would have adopted special methods of conveyancing to conceal the fact that interest for the loan was, in fact, to be given and received.

That, however, is not the only significance of this bond. The appellant's contention is, and to be effective must be, that an agreement was come to between the parties that the twenty biswas

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zamindari property in the Mauza should be mortgaged to the so-called vendees for a sum of 5,500 rupees, and next that the agreement should be carried out by a deed of sale and a contract for repurchase. If no such agreement was made before the deed of sale was executed and the latter deed was an after-thought, only suggesting itself after the sale deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of repurchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction. Well, if the agreements for the granting of a mortgage had been arranged on or before the 29th August, 1852, it seems strange that no reference whatever should be made to it in this bond, and still more strange that the parties should have gone out of their way to represent as an unqualified sale what was, in fact, merely a conditional sale. The recital in the bond is certainly more consistent with the contract for repurchase being an afterthought than the contrary.

The sale deed and this bond were both registered at 1 o'clock on the same day, the 18th May, 1853.

Now turning to the agreement of the 5th September, 1852, seven days later in point of date than the two instruments already referred to, one finds that it begins by reciting that under the sale deed of the 29th August, 1852, the parties to it had purchased the twenty biswas Zemindari and revenue-paying property with the appurtenances in Mauza Murlipur Phul for a sum of 5,500 rupees from the so-called vendors, and then proceeds to set forth that the executants are now willing to help and treat with kindness the vendors, and that of their own free will, they (the executants) covenant in writing that if the vendors after the lapse of from nine to ten years from the date of the execution of the deed pay to the executants the purchase money mentioned in the sale deed, *i.e.*, the sum of 5,500 rupees, out of their own pocket without mortgaging or selling this property to other persons, the executants shall forthwith execute a fresh resale deed on receipt of this sum of 5,500 rupees, and get mutation of names in the revenue papers. Stopping there for the moment, it is contended that this provision as to the payment of the 5,500 rupees out of the pocket of the vendors is more consistent with the transaction being a mortgage than an agreement for resale entered into from kindly feelings. Their Lordships cannot accept that contention. The stipulation is wholly inconsistent with the relation of mortgagor and mortgagee. It is very doubtful indeed, if it would not be illegal as amounting to an encroachment

on a mortgagor's right to redeem the mortgage property from whatever source he might procure the funds to do so. But if the executants, though *bona fide* and absolute purchasers for value of these lands, were yet, from kindly feelings to the vendor, themselves willing to restore the vendors to the possession and enjoyment of their property, it was quite natural that they should provide against a sale or mortgage which would result in merely putting some persons other than these former owners into the possession and enjoyment of the property purchased, substituting practically the new mortgagees or purchasers for the executants themselves. In their Lordships' view, this provision makes against the appellant's contention rather than in favour of it.

Much reliance, however, was placed upon the immediately succeeding provision of the agreement. It runs thus: "In the event of our refusal, they have power to deposit into the treasury attached to the Court the amount of the consideration in the sale deed, *and* after institution of a suit in Court to purchase their property again." It was suggested by Mr. Justice Tudball that the original document was not properly translated, and that the word *and* was improperly introduced after the words "sale deed." It may be so, but their Lordships do not think its omission would alter the sense of the passage. The wording of the first two lines leaves their meaning somewhat obscure. They may mean to confer upon the vendors the right and power to make this deposit, or they may possibly mean merely to state the fact that the vendors already possess this right and power having derived them from a source external to the agreement itself.

Their Lordships think that, having regard to the whole frame and wording of the document, the former, and not the latter, is the true meaning of this provision. Even on that view, however, it is contended on behalf of the appellant that, as the right and power thus conferred are the same or very similar to those conferred upon mortgagors by bai-bil-wafa mortgages, under the provisions of Regulations 1 of 1798 and 17 of 1806 framed under the Bengal Code, the provision clearly discloses the intention of the parties to create, in this instance, a mortgage of that character. On referring to these Regulations it will be seen that they apply to cases where there is a stipulation that unless the money borrowed be repaid, with or without interest, within a fixed period the sale should become absolute, and were designed to relieve the mortgagor from the necessity of proving that he had tendered, or was ready and willing to pay the money due within the time limited, especially in

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the case where the fact of the tender was denied by the lender, and also to afford the mortgagor the means of establishing before a Court of Judicature that he had in fact made the tender, or was willing to pay the amount due within the time limited, or to have it determined whether his having omitted to do so made the sale absolute.

No doubt these provisions were intended to apply to mortgages effected by conditional sale and contracts for repurchase, and the fact that their machinery is made applicable to this case might, if the clause was properly drawn, disclose to some extent an intention that it was intended to create a mortgage; but the clause is extremely ill-drawn, and its provisions are self-contradictory. In its first portion it expressly provides that the repurchase can only take place, not during, but after the lapse of nine or ten years from the date of the execution of the deed. In its latter portion, it provides that if the vendors be not ready to purchase the property within the aforesaid time, they shall have no claim to the property after the expiry of the period of ten years, and the vendees shall then have every power in respect of the property. It is impossible to say whether the parties intended that the vendees should be secure in the possession of the property for nine or ten years, and might then be got rid of, or whether their right to possession was to be defeasible at any time during the ten years and after that to become absolute.

A clause so obscure and contradictory cannot furnish any true guide to the intention of the parties.

In the case of *Balkishen Das* v. *Legge* (1), a certain period was fixed by the collateral agreement, within which the vendor was to be allowed to repurchase. The vendors were indebted to the vendees, their bankers, in a sum of 1,90,000 rupees. Three deeds were executed: the first two bore date the same day, and the last of the three was a mortgage of the vendor's factory. The first was, on the face of it, a deed of absolute sale of a certain talook for a sum of 1,50,000 rupees, of which 137,333 rupees were to be retained as the amount due to the vendees under a previous mortgage of the same talook for principal and interest, the balance being retained by the vendees in part payment of a debt due to them by the vendors in respect of advances made by the former to run the vendors' factory. The second deed, dated the 4th February, 1873, provided that if the vendors should on the 1st March, 1876, pay, not the purchase money merely, but 15,000 rupees in addition,

(1) (1899) L. R. 27 I. A. 58; I. L. R. 22 All. 149.

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1,65,000 rupees in all, and such further sum as might be found to be due by them to the vendees in respect of the vendors' factories they might repurchase. There was in this latter deed a provision similar to that in the present, in reference to depositing the sum to be paid to secure repurchase. Oral evidence was admitted by the Subordinate Judge for the purpose of proving the intention of the parties. This evidence was held to be inadmissible. No opinion was expressed upon the point whether a conditional sale becomes subject to an equity of redemption by force of the Bengal Regulations, independent of the intention of the parties. The real ground of the decision appears to have been this, that the real effect of the deeds was to consolidate the debt due on the factory account with the principal sum mentioned in the first deed, and thus to give the bankers a security on the talook for the debt due on the factory accounts. This, as Lord Davey, delivering the judgment of the Board, said, "gives the transaction the character of a mortgage so far as the factory accounts are concerned. And if it is to some extent a mortgage, it may well be held to be so entirely."

The case is entirely distinguished from the present, and it does not appear to their Lordships to follow necessarily from the words of Lord Davey, just quoted, that the decision might not, despite the identity of the dates of the two deeds and the presence of the provision as to depositing the amount to be paid, have been the other way had the debt on the factories not been consolidated. The case of *Bhagwan Sahai* v. *Bhagwan Din and others* (1) resembles the present case much more closely. There the two documents, the deed of sale and the contract for repurchase bore the same date, the 20th February, 1835. By the first Alum Singh purported to sell his entire property to Gange Den for 4,000 rupees current coin. By the second, which recited the first, it was provided that, as a matter of favour, much kindness, and indulgence, if the vendor should, within a period of ten years from the date of the deed, pay in a lump sum and without interest the 4,000 rupees; the vendee would accept the same and cancel the sale. It further provided that during the term of ten years the vendee should remain in possession, collect the rent, enjoy the profits, and be liable for loss, the vendors having no concern whatever; they should not claim profits and the vendee should not claim interest; and in case the whole of the principal should be not paid according to the terms of the document, "the vendors not to be able to cancel the deed by repayment of principal and interest." Sir Barnes Peacock, in

(1) (1890) L. R. 17 I. A. 98; I. L. R. 12 All. 387.

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delivering judgment, cited and relied upon the judgment of Lord Cranworth in *Alderson* v. *White* (1), in which much importance was attached to the fact that the sum to be repaid on repurchase was, as in the present case, the precise amount of the original purchase money. Lord Cranworth, at page 105 of the report, laid down the rule of law applicable to such cases as these, thus: "The rule of law on this subject is one dictated by common sense, that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." That statement of the law by Lord Cranworth was approved of in *Manchester, Sheffield,* and *Lincolnshire Railway Company* v. *North Central Waggon Company* (2). It may not be applicable to transactions governed by the Mahomedan Law. It was apparently held applicable by Sir Barnes Peacock, who had vast experience of India and its people, to the case before him. In this particular case Sir Barnes Peacock decided that it was clear that the case was not one of mortgagor and mortgagee, but one of absolute sale with a right to repurchase within a period of ten years.

There is one other remark of Lord Cranworth's in *Alderson* v. *White*, (1) which is particularly applicable to the present case. He said: "I think a Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be." In the present case the period of ten years fixed for repurchase terminated in 1863. Not till the 5th October, 1907, forty-four years after the lapse of that period, was this suit instituted. The judgment appealed from was delivered on the 11th March, 1911. The record was not received at the Privy Council Office till the 25th February, 1915, and the appeal not set down for hearing until June 1916. Litigation so prolonged becomes an instrument of oppression, is discreditable to any judicial system, and every effort should be made to correct the abuse.

On the whole case their Lordships are of opinion that the Decree appealed from was right and should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Barrow, Rogers & Nevill:—Solicitors for the Appellant.

Douglas Grant:—Attorney for the Respondents.

J. M. P. *Appeal dismissed.*

(1) (1858) 2 De G. & J. 105.

(2) (1888) 13 App. Cas. 554 (568).

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

MONMOTHO NATH MITRA

v.

DISTRICT JUDGE, 24-PERGANAS.*

Civil.
1916.
August, 28.

Application—Resistance to delivery of possession—Sale under Putni Regulation—Putni Regulation (VIII of 1819), Sec. 15, cl. (2)—Act VIII B. C. of 1865, Sec. 3, if controls Sec. 15, cl (2) of Regulation VIII of 1819.

Clause (2) of section 15 of the Putni Regulation has not been affected by section 3 of Act VIII, B. C. of 1865 and hence a purchaser at a sale held under the Putni Regulation, when resisted in obtaining delivery of possession, is to apply to the District Judge and not to the Collector.

Application by the Purchaser.

Application under section 15 clause (2) of the Putni Regulation.

The material facts appear from the judgment.

Babu Narendra Chandra Bose for the Petitioner.

Babu Ram Charan Mitra for the Opposite Party.

The judgment of the Court was delivered by

August, 28.

Mookerjee, J.—This Rule raises an important question of first impression as to the true effect of section 3 of Act VIII of 1865 B. C. upon the second clause of section 15 of Regulation VIII of 1819. The clause in question describes the procedure to be followed in case of opposition to the new purchaser of the putni, when he proceeds to take possession of the land covered by his purchase. The clause lays down, that if the late incumbent himself or the holders of tenures or assignments derived from the late incumbent and intermediate between him and the actual cultivators shall attempt to offer opposition or to interfere with the collections of the new purchaser from the land composing his purchase, the latter shall be at liberty to apply immediately to the Civil Court for the aid of the public officers in obtaining possession of his rights. Section 3 of Act VIII of 1865 B. C. provides that the sale for the recovery of arrears of rent of putni taluks and other saleable under-tenures of the nature defined in clause (2) of section 8 of Regulation VIII of 1819 shall be conducted by the Collector of land revenue in whose jurisdiction, as defined by Act VI of 1853,

* Civil Rule No. 694 of 1916, against an order of H. P. Duval, Esq., District Judge of 24-Perganas, dated the 21st August, 1916.

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the lands lie, and all acts *preparatory to or connected with* the sale of such under-tenures as aforesaid, which by Regulation VIII of 1819 and Regulation I of 1820 the Judge is required to perform shall be performed by the said Collector. The question thus arises, whether the effect of section 3 is to make it obligatory upon the purchaser, when he seeks to proceed under the second clause of section 15 of the Regulation, to apply, not to the District Judge but to the Collector.

The answer to the question in controversy depends upon the true meaning of the expression "*acts preparatory to or connected with the sale*," in section 3 of Act VIII of 1865 B. C. Instances of acts preparatory to or connected with the sale were contained in sections 8 and 9 of the Regulation as originally framed. Section 8 required the Zemindar, when he desired to sell a putni for arrears of rent, to present a petition to the Civil Court of the District and a similar one to the Collector. Section 9 contained a provision that the sale should be made by the registrar of the Civil Court or in his absence by the person in charge of the office of Judge or of Magistrate of the district. These were clearly acts preparatory to or connected with the sale, and the effect of section 3 was to render these provisions nugatory and to transfer the functions to the Collector. Now, can it be reasonably maintained, in the case before us, that what the petitioner asks the District Judge to do is an act connected with the sale? We are of opinion that the question should be answered in the negative. The sale took place on the 16th May, 1910. Proceedings were taken to annul the sale and have terminated in favour of the purchaser. The sale has consequently become for all purposes final and conclusive. The purchaser now alleges that he is resisted in his attempt to take possession of the lands comprised in the tenure purchased by him. Can it be said, when he seeks the assistance of the District Judge under the second clause of section 15 of the Regulation, that the act to be performed is connected with the sale? Clearly not. It is an act subsequent to the sale, an act which can be performed only on the basis of a valid and concluded sale, no longer liable to be impeached. We must hold accordingly that clause 2 of section 15 of the Regulation has not been affected by section 3 of Act VIII of 1865, B. C. The view we take is confirmed by two circumstances. In the first place, Act VIII of 1865 B. C., as is explained in the preamble, was enacted because "doubts have arisen in consequence of the repeal of section 16 of Regulation VII of 1832 as to the authority by whom Putni Taluks and other saleable under-tenures

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of the nature defined in clause 1 of section 8 of Regulation VIII of 1819 are to be sold for arrears of rent due to the proprietor on account thereof." There is no indication here that the Legislature intended that any alteration should be effected in the second clause of section 15. In the second place, that the Legislature had no such intention is conclusively proved by the provisions of Act XVI of 1874. That Act was passed for the purpose of repealing certain obsolete enactments, because, as explained in the Preamble, "the enactments mentioned in the schedule to the Act had ceased to be in force otherwise than by express and specific repeal." In the schedule we find that certain expressions in sections 8 and 9 of the Putni Regulation which had become obsolete by reason of the provisions of section 3 of Act VIII of 1865 B. C. are expressly repealed. But clause 2 of section 15 is left untouched. If the Legislature had thought in 1874 that the provisions of clause 2 of section 15 had been affected by section 3 of Act VIII of 1865 B. C., no doubt that section also would have been suitably altered.

On these grounds we hold that the view taken by the District Judge is erroneous and that he has failed to exercise the jurisdiction still vested in him by law, that is under clause 2 of section 15 of the Putni Regulation. The Rule is made absolute and the order of the District Judge is set aside; the petition will be transmitted to the District Judge in order that he may take necessary steps thereon in accordance with law.

A. T. M. *Rule made absolute.*

APPELLATE CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

NOBIN CHANDRA GHOSH
v.
NILKAMAL MUKHOPADHYA.*

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1916.

May, 19, 22.

Declaratory suit—Declaration of specific character—Case, failure of—Different declaration, when can be had—Limitation Act (IX of 1908), Sec. 28.

* Letters Patent Appeal No. 106 of 1914, against the decision of Mr. Justice Mullick, dated the 14th August, 1914, in Appeal from Appellate Decree No. 234 of 1913, against the decree of H. P. Duval Esq., District Judge of 24 Pergunnas, dated the 30th September, 1912, reversing that of Babu Purna Chandra Bose, Munsiff, 1st Court, at Alipur, dated the 19th December, 1911.

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When a plaintiff came into Court with a view to obtain a declaration of title as the holder of a permanent and transferable tenancy interest in the disputed land and the case completely failed ; *Held*, that he could not obtain a declaration that he acquired the status of the holder of a non-transferable occupancy holding by reason of adverse possession.

Quare: Whether the effect of section 28 of the Limitation Act is simply to extinguish the title of the person who is out of possession or whether it operates as an assignment or conveyance of the interest of the person who is out of possession to the person who is in possession.

Per Mookerjee, J. : When a plaintiff seeks a declaration of a specific character and fails to establish the facts whereon such declaration can be founded, he is ordinarily not entitled to a different declaration : *Hemendra* v. *Upendra* (1) referred to. But the Court has a discretion in a matter of this description and may, if the defendant is not taken by surprise, grant the plaintiff a declaration different from the precise relief sought in the prayer clause of the plaint.

Abhoy v. *Kally* (2) referred to.

Appeal by the Plaintiff.

Suit for a declaration of plaintiff's *maurasi makarari* right to certain lands and of his title acquired thereto by adverse possession and for declarations that defendant No 2 and his predecessor never held the land in suit nor paid any rent for the same, that the plaintiff and not defendants Nos. 2 to 8 was in actual possession of the land, that the rent decrees obtained by defendant No. 1 against defendant No. 2 and another were collusive and fraudulent, that the plaintiff was not bound by those decrees and that the land in suit was not liable to be sold in execution thereof. The primary Court dismissed the suit, but the first appellate Court decreed it. On second appeal, that judgment was reversed by the following judgment of

1914.

Mullick, J.—The land in suit is the holding of Kasim Mollah. The plaintiff purchased Kasim Mollah's interest in execution of a money decree in 1895 and took possession in 1896. He states that he has been duly recognised by the landlord and has paid rent to him and that since his recognition the landlord has sold the holding to defendant No. 1. It is alleged that defendant No. 1 refusing to recognise the plaintiff split up the *jamma* and brought two suits, one for a rental of Rs. 4-4-0 against defendant No 2, who is the son of Kasim Mollah, and the other for Rs. 1-8-0 against Bhutni Mollah, the predecessor of defendants Nos. 3—8. When the holdings were advertised for sale in execution of decrees for rent obtained in these suits the plaintiff saved the properties by

(1) (1915) 22 C. L. J. 419 (451) ; I. L. R. 43 Calc. 743.
(2) (1880) I. L. R. 5 Calc. 949 ; 6 C. L. R. 260

paying into Court Rs. 53-3-9. The Munsiff dismissed the suit, but the District Judge decreed it.

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The defendant No. 1, the landlord, now appeals. The learned Judge has found that the interest of Kasim Mollah was not transferable, but that the plaintiff has by more than 12 years' adverse possession acquired a limited interest of tenancy against the landlord. He has relied on the case of *Icharan Singh* v. *Nilmony Balidar* (1). The words used by the learned District Judge in the material portion of his judgment are as follows: "I find therefore the facts to be that the plaintiff has all along since 1896, when he purchased the right title and interest of Kasim Mollah, been in possession of the land in suit, but has never paid any rent though he was willing to pay to the respondent, who has however refused to recognise him"

There is a clear finding that the plaintiff has been recognised neither by defendant No. 1 nor by his predecessor, the original landlord. On the other hand there is no finding that the plaintiff has ever set up a hostile title and in the absence of such a finding I do not think the learned Judge's decree can be supported. It appears that the rent has hitherto been paid by the plaintiff in the name of the original tenants and a mere willingness on the part of the plaintiff to pay the rent in his own name does not, in my opinion, amount to a hostile assertion of title. A refusal to pay rent at all, unless he was recognised as a tenant, would have been one way of setting up an adverse claim of tenancy, but upon the findings of the learned Judge, as they stand, the decree cannot be supported. The appeal will therefore be allowed and the decree of the Munsiff restored with costs throughout.

Against this decision, the plaintiff preferred an appeal under section 15 of the Letters Patent.

Babu Karunamoy Bose for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Brojendra Nath Chatterjee* for the Respondent.

The following judgments were delivered :

May, 22

Sanderson, C. J.—In this case the suit was brought by the plaintiff asking for a declaration of his *maurasi makarari* right to certain lands and of his title acquired thereto by adverse possession for upwards of twelve years and for declarations that defendant No. 2 and Bhutni Molla never held the land in suit or paid any rent for the same, that the plaintiff and not defendants Nos. 2 to 8 was in actual possession of the land and the land consisted of, not of

(1) (1908) I. L. R. 35 Calc. 470 : 7 C. L. J. 400.

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two plots, but of only one plot bearing a rental Rs. 3-1-10 gundas and that the rent decrees obtained by defendant No. 1 against defendant No. 2 and Bhutni Molla were collusive and fraudulent and the plaintiff was not bound by those decrees and the land in suit was not liable to be sold in execution thereof.

It appears that the land in question was the property originally of one Karnadhar Mandal who created a tenancy in Kasim Molla—that was a non-transferable occupancy tenancy. In November 1895, a decree having been obtained against Kasim Molla, the interest of Kasim Molla was sold in execution of the money decree which had been obtained, and the plaintiff bought the interest belonging to Kasim Mollah at such sale. In April 1896, the plaintiff got possession of the land, and he remained in possession up to 1910 and in fact he remains in possession up to the present moment. In 1910, the plaintiff deposited a certain sum in Court, because it appears that in 1907, a decree had been obtained by the transferee from Karnadhar, who was defendant No. 1 against Kassim Molla's heirs for four years' rent (1903 to 1907), and in order to prevent the tenancy from being sold, the plaintiff, as I have already said, deposited the requisite amount in Court I ought to mention that in 1898, two years after the plaintiff got possession, Karnadhar the then owner sold the property to defendant No. 1, together with the rents which were then in arrears, and it was mentioned in the conveyance that Kassim Mollah was one of the tenants who were in arrears for rent: and, although the plaintiff had already been in possession for two years at that time, the plaintiff's name was not mentioned amongst the tenants whose rents were in arrears.

Now, the plaintiff having deposited the money in Court in 1910, proceeded to bring this suit, which as I have already said, was primarily for a declaration of his right, namely *maurasi makarari* right to the land in suit.

The first Court dismissed the suit. The second Court decreed it, the learned Judge basing his decision on the ground that by reason of the plaintiff having been in possession from 1896 down to the time the suit was brought, for more than twelve years, he had obtained a title to a limited interest in the land, and that limited interest was described by the learned Judge not as *maurasi makarari* right as was claimed by plaintiff but an occupancy non-transferable right. The defendant appealed to the High Court, and Mr. Justice Mullick sitting alone allowed the appeal and dismissed the suit.

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Now, in this case it is clear, first of all, that there was no express contract of tenancy between the plaintiff, the alleged tenant, and defendant No. 1, the landlord: nor was there, in my opinion, an implied contract between the plaintiff and defendant No. 1, for the findings of fact by the learned Judge, by which we are bound are as follows: He says, "I find therefore the facts to be, that the plaintiff has all along, since 1896, when he purchased the right title and interest of Kasim been in possession of the land in suit but has never paid any rent though he was willing to pay to the respondent who however has refused to recognise him." In addition to those facts, there are two facts to be mentioned: one I have already referred to, namely, when Karnadhar sold his property to the first defendant, he obviously did not recognise the plaintiff as a tenant but recognised Kasim as a tenant: and *secondly*, in 1907 a suit was brought by the present landlord, defendant No. 1, for four years' arrears of rent, in which suit the defendants were the heirs of Kasim and not the plaintiff in this case: and, therefore, in my judgment, it cannot be said upon the facts that there was an implied contract between the landlord and the plaintiff.

The learned vakil who argued this case on behalf of the appellant urged that by reason of the plaintiff being in possession for more than twelve years the plaintiff has acquired a title to a limited interest which is a tenancy, and that he is entitled to a declaration by this Court of his tenancy and, he relies upon certain cases, to one of which I intend to refer—*Icharan Singh* v. *Nilmoney Balidar* (1). The judgment to which I refer is one given by my learned brother Mr. Justice Mookerjee and the late Mr. Justice Stephen. That was an action for ejectment —and as far as I am aware all the cases to which our attention has been drawn, were actions for ejectment,—and the defendant was objecting to be turned out relying on the ground that he had been in possession of the land for the requisite number of years and during that time he had been asserting his right to be there as tenant of the plaintiff. My learned brother said in that case at page 476 of the Report, "As was pointed out by this Court in the case of *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (2), possession of a limited interest in immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property: but such adverse possession of a limited interest, though

(1) (1908) I. L. R. 35 Calc. 470; 7 C. L. J. 499. (2) (1905) 2 C. L. J., 125.

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a good plea to a suit for ejectment, is good only to the extent of that interest ; the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it ; there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest has been asserted." I want to guard myself expressly by saying that I do not decide, and I do not think it is necessary for the decision of this case to come to any conclusion upon the question, whether that declaration of the law which is there laid down, and which has been held to be applicable to a defence to an action for ejectment, is applicable to a case like this, where the alleged tenant in occupation comes before the Court and asks for a declaration. I desire to make it quite clear that my judgment in this case is not intended to contain any opinion upon that question either in one way or the other. As far as I am concerned, I wish to leave it entirely open for further consideration if it ever arises: nor do I express any opinion as to what is the effect of section 28 of the Limitation Act,—whether the effect of that section is simply to extinguish the title of the person who is out of possession or whether it operates as an asignment or conveyance of the interest of the person who is out of possession to the person who is in possession. I leave the matter entirely open for future consideration if the occasion ever arises. Neither of these questions, in my opinion, need be decided in this case for these reasons: Even if the law as stated in the passage which I have just read is applicable to this case, in my opinion, this Court cannot decree the declaration which the plaintiff is asking for. The plaintiff came to Court asserting that he was in possession of the land and that he had obtained a title to a permanent tenancy which he said he had got from Kasim Molla. It having been held against him that the interest, which Kasim Molla had, was not a permanent tenancy but was a non-transferable occupancy right, he then turns round and says 'very well, I now base my claim to a declaration on the ground that I have been in possession of this land for twelve years, and ask the Court for a declaration that by reason of that adverse possession I have got a title to a non-transferable occupancy holding.' In my opinion, he cannot do that because he came to Court with the case—and this was his whole case—that he had been asserting during twelve years his right and title to a permanent tenancy, and that consequently by reason of the operation of the statute of Limitation by adverse possession he obtained a title to that tenancy. It having been found that he never had such tenancy,

how can he ask this Court to make a declaration that he has got title to a non-transferable occupancy holding. To put it shortly, he comes to the Court with the case that he has been in occupation of the land for twelve years asserting his title to one kind of tenancy; he now asks the Court in consequence of that occupation for twelve years to make a declaration that he has a right and title to another kind of tenancy. I draw attention again to the words used by my learned brother Mr. Justice Mookerjee and Mr. Justice Stephen in the passage which I have quoted, namely, "such adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest; the nature and effect of possession must depend upon the nature and extent of the rights asserted by *the overt conduct or express declaration* of the person relying on it." The express declaration alleged by the plaintiff in this case was that he was entitled to a *maurasi mokarrari* tenure, a permanent tenancy. According to his case his overt conduct had all along been that he was entitled to that tenure and had obtained it from Kasim Molla; It is impossible for him now to turn round and say that although I had no right to the tenure which I have asserted for these twelve years, still by adverse possession I am entitled now to come and ask the Court to make a declaration that I have a tenancy of a totally different kind.

For these reasons I think the learned Judge was right when he dismissed the suit, and I think the appeal should be dismissed with costs.

Mookerjee, J.—The subject matter of this litigation, which has culminated in the present appeal, is an agricultural holding, at one time held by Kasim Molla as tenant under the first defendant. On the 14th November, 1895, the plaintiff purchased the right, title and interest of Kasim Molla at a sale held in execution of a decree obtained against him by his creditor Karnadhar. On the 16th April, 1896, the plaintiff obtained delivery of possession through Court, and, it has been stated here that he was in possession at the date of the suit. On the 18th June, 1907, the first defendant obtained a decree for arrears of rent for four years antecedent to the date of the institution of that suit. This decree was obtained against the other defendants to this litigation as the representatives of the original tenant. Execution was taken out in due course and steps were taken for the sale of the holding. The plaintiff, thereupon, on the 10th August, 1910, deposited the decretal amount in Court in the name of the judgment-debtors. On the 23rd December, 1910, the plaintiff instituted the present action for fivefold relief,

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namely, *first*, that his title as the holder of a permanent and transferable interest in the land, either by purchase or by adverse possession for the statutory period, be declared; *secondly*, that the decree for rent obtained by the first defendant against the other defendants be declared collusive and fraudulent; *thirdly*, that an injunction be issued against the first defendant, so as to restrain him from hereafter instituting suits for arrears of rent in respect of the disputed land against any person other than the plaintiff; *fourthly*, that a decree be passed against the first defendant for refund of the sum deposited by the plaintiff on the 10th August, 1910, to satisfy the rent decree; and *fifthly*, that such other relief be granted as the Court might consider fit and proper in the circumstances of the case.

The primary Court dismissed the suit; upon appeal, the District Judge made a decree, not precisely as prayed by the plaintiff, but in the following terms: "The plaintiff appellant is entitled only to this relief that he is hereby declared to be a tenant holding a non-transferable occupancy right in respect of the land mentioned below under the first defendant." Upon appeal to this Court, the decree of the District Judge has been set aside by Mr. Justice Mullick. The present appeal has been preferred under clause 15 of the Letters Patent against the judgment of Mr. Justice Mullick. In my opinion, on the facts found, the suit as framed must stand dismissed.

The plaintiff came into Court with a view to obtain a declaration of title as the holder of a permanent and transferable tenancy interest in the disputed land. That case has completely failed, as the Courts below have concurrently found that the land constituted a non-transferable occupancy holding. The purpose of the first declaration asked in the plaint is not far to seek, and is plainly indicated by the other declarations already mentioned. The real object of the plaintiff is to obtain an injunction against the first defendant so as to prevent him from instituting suits for arrears of rent in future against any person other than the plaintiff. The plaintiff seeks in substance, to obtain a declaration that he holds the disputed land as a permanent transferable holding under the first defendant and as such he must be sued for arrears of rent in future. It is not disputed, and on the facts found it cannot be disputed, that the plaintiff is not entitled to this declaration. The plaintiff, thus defeated, however, turns round and contends that he should be granted a declaration on the basis of the facts found by the District Judge. In my opinion, this application, should not be

entertained. When a plaintiff seeks a declaration of a specific character and fails to establish the facts whereon such declaration can be founded, he is ordinarily not entitled to a different declaration. If authority is needed for this elementary proposition, reference may be made to the decision in *Hemendra Nath Roy* v. *Upendra Narayan Roy* (1). No doubt, the Court has a discretion in a matter of this description and may, if the defendant is not taken by surprise, grant the plaintiff a declaration different from the precise relief sought in the prayer clause of the plaint [*Abhoy* v. *Kally* (2)]. But the case before us is obviously not of that character. Before the plaintiff can obtain a declaration that he has acquired the status of the holder of a non transferable occupancy holding under the first defendant, questions of some nicety will require investigation. His allegation that he has been recognised as such, has not been substantiated. Has he, then, acquired such right by adverse possession of a limited interest, on the principle explained in *Protap* v. *Biraj* (3); *Ishan* v. *Ramranjan* (4); *Iharan* v. *Nilmoney* (5); *Raktoo* v. *Sudhram* (6); what again is the true effect of section 28 of the Limitation Act, as explained in *Gossain* v. *Issur* (7); does it extinguish the interest of the owner and at the same time vest it in the adverse possessor; if so, does this hold good in respect of a non-transferable tenancy, not only as between the tenant and his dispossessor, but also as between the latter and the landlord; in other words, does the statute of limitation operate only by way of extinguishment, and not by way of assignment of the estate, which is barred, as maintained in *Tichborne* v. *Weir* (8), and *O'Connor* v. *Foley* (9). Does the principle recognised in *Probhabati* v. *Taibatunnessa* (10), and *Panchkari* v. *Maharaj* (11), apply not only to suits for ejectment by the landlord, but also to declaratory suits against the landlord? These are not all pure questions of law, some of them are mixed questions of fact and law. In the solution of some of these questions one important matter for investigation, for instance, is, what happened between the parties during the years 1896-1907? Did

(1) (1915) 22 C. L. J. 419 (451); I. L. R. 43 Calc. 743.
(2) (1880) I. L. R. 5 Calc. 949; 6 C. L. R. 260.
(3) (1913) 19 C. L. J. 77. (4) (1905) 2 C. L. J. 125.
(5) (1908) 7 C. L. J. 499; I. L. R. 35 Calc. 470.
(6) (1907) 8 C. L. J. 557. (7) (1877) I. L. R. 3 Calc. 224.
(8) (1892) 67 L. T. N. S. 735; 4 R. 26.
(9) (1905) 1 I. R. 1; (1906) 1 I. R. 20.
(10) (1913) 19 C. L. J. 62; 17 C. W. N. 1088.
(11) (1914) 19 C. W. N. 136.

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the landlord receive rent in respect of the disputed property, during that period, if so, from whom? Was the rent paid by the original tenant whose interest had been sold in execution, or was it paid to the first defendant by the plaintiff in the name and as the agent of the original tenant? Did the plaintiff, in other words, assert a tenancy right in himself, or, did he deal with the landlord on the hypothesis that the tenancy still continued in the original tenant, as in *Jadu Nath* v. *Raj Narain* (1) [see also *Tarubai* v. *Venkatrao* (2)]. It is obvious that these matters may have a very important bearing upon the question of the determination of the *status* of the plaintiff. But none of them has been raised or investigated, because the plaintiff founded his claim on the allegation that the tenancy was permanent and transferable. That case has failed after a protracted trial; it is difficult to see on what, conceivable principle he can now take shelter under entirely different allegations, and obtain a re-investigation. Apart from this, there is an additional reason why the plaintiff should not now be permitted to seek a declaration different from that mentioned in the plaint. His case now is that he has acquired a good title to the occupancy holding by prescription for the statutory period. He can establish it if at all only upon proof that he has asserted that specific title for the statutory period. But, according to his own case as sought to be established by his evidence, the plaintiff has throughout asserted, as against his landlord, that he had acquired a good title to a permanent and transferable holding. He cannot now turn round and contend that he has acquired the *status*, by prescription, of a raiyat in respect of a non-transferable occupancy holding. In my opinion, the plaintiff cannot possibly be allowed to depart from the allegation which he specifically made in the plaint and endeavoured to support by his evidence, and to succeed on a case totally distinct from and in some respects contradictory to that position.

I agree accordingly that the decree made by Mr. Justice Mullick must be affirmed and this appeal dismissed with costs.

A. T. M. *L. P. Appeal dismissed: Suit dismissed.*

(1) (1912) 17 C. W. N. 459.
(2) (1902) I. L. R. 27 Bom. 43 (53).

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

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1916.
May, 26.

LASKARI AND OTHERS

v.

ABBAS BEPARI*

Appellate Court—Framing an entirely new issue—Procedure—Civil Procedure Code (Act V of 1908), O. 41, R. 25.

The primary Court framed the following issue, "Have the plaintiff and his co-villagers their alleged right of way by necessity, grant or prescription." Evidence was taken with regard to that issue. When the case was before the learned Judge in the first appellate Court, he came to the conclusion that the issue which was really material had not been stated in the Court below, and, consequently, he framed the issue himself which was in these terms, "Have the plaintiffs acquired the right of user over the disputed path by virtue of any custom." He then dealt with the case upon the evidence as it stood, without taking any further evidence or remanding the case for further evidence: *Held*, that as the learned Judge framed an entirely new issue, he came within order 41 rule 25 of the Code of Civil Procedure, and should, therefore, refer the case for trial to the primary Court and direct that Court to take additional evidence required.

Appeals by both parties.

Suit for a declaration of a right of way over some land which was in the defendant's separate possession.

The plaintiff and defendant No. 1 were co-sharers. The Court of first instance partially decreed the suit by declaring "a right of way as a village path by necessity over the disputed path as laid down in the Commissioner's map," and by restraining "the principal defendants from interfering with the existing breadth between stations 5 to 9 by encroachment and by obstruction." Both sides appealed against that decree with the result that the first appellate Court dismissed the defendant's appeal but partially decreed the plaintiff's appeal. Defendant No. 1 then preferred an appeal to the High Court. The case was remanded by the following decision of

1915.
February, 1.

Mullick, J.—The plaintiff and defendant No. 1 are co-sharers. The plaintiff sues on behalf of his co-villagers for a declaration of a

* Letters Patent Appeals Nos. 24 and 25 of 1915, against the decision of Mr. Justice Mullick, dated the 1st February, 1915 in Appeal from Appellate Decree No. 1938 of 1912, against the decree of Babu Satkari Halder, Subordinate Judge 1st Court of Tipperah, dated the 18th April, 1912, modifying that of Babu Nirad Ranjan Guha, Munsiff 1st Court, at Comilla, dated the 20th March, 1911.

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right of way 12 cubits wide over some land which is in the defendant's separate possession.

The Commissioner deputed to make a local investigation found a path of varying width running through the village from north to south. He considered that an uniform width of 7 to 8 cubits was necessary to the villagers. The Munsiff came to the conclusion that as regards the northern and southern portions of the path shown on the Commissioner's map the plaintiff had no cause of action inasmuch as the defendant had in no way interfered with the use thereof but that in respect of that portion which lay between stations 5 to 9 the defendant had by levelling some land to the east raised an apprehension of injury in the plaintiff's mind; that the plaintiff had acquired an easement of necessity in the whole length of the existing path and that between stations 5 to 9 where the width varied from 3 to 6 cubits the alleged obstructions being more than 12 years old the claim for a way of greater width was barred by limitation. The Munsiff therefore partially decreed the suit by declaring "a right of way as a village path by necessity over the disputed path as laid down in the Commissioner's map" and by restraining "the principal defendants from interfering with the existing breadth between stations 5 to 9 by encroachment and by obstruction."

Both sides appealed against this decree with the result that the learned Subordinate Judge dismissed the defendant's appeal but partially decreed the plaintiff's appeal. He found that the plaintiff had established a customary right to a village path 7 cubits in width and that the decree for an easement of necessity could not be supported. He accordingly directed that "the plaintiffs do recover possession thereof by removing all obstructions if any put up or created by the defendant thereon."

The present second appeal is preferred by defendant No. 1. It is conceded by the learned vakil for the appellant that he is not concerned to resist the learned Subordinate Judge's decree in respect of any portion other than that lying between stations 5 to 9. The substance of his appeal is that the learned Subordinate Judge has made a new case of custom and has taken him by surprise. Now the plaintiff claims not a public way but a village path or as he puts it in his plaint a semi-public way and he bases his title on grant, prescription, 20 years' user and necessity. The Munsiff finds that a grant, express or implied, is neither proved nor capable of being presumed. He therefore rightly holds that the plaintiff cannot base his title on grant or prescription.

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The learned Munsiff next finds more than 20 years' user of the existing path proved but his judgment is silent upon the question whether the plaintiff has acquired a title under section 26 Limitation Act. It would seem from their omission to mention this aspect of the case that both the Munsiff and the Subordinate Judge were of opinion that the character of the plaintiff's enjoyment does not fulfil the conditions of that section. The learned Munsiff therefore falls back upon necessity. But, as the learned Subordinate Judge has very properly observed, if no grant can be presumed then there can be no way of necessity and the learned Munsiff's decree cannot be sustained. The learned Subordinate Judge therefore thinks that the proper issue which arises in the case is whether any customary right is established. Now although the plaint does not allege any custom I agree that it would be unfair to scrutinise Mufussil pleadings with too much rigour and I cannot under the circumstances say that the Subordinate Judge was wrong in framing the issue "Have the plaintiffs acquired the right of user over the disputed path as a village path by virtue of any custom." But the defendant was clearly entitled to adduce rebutting evidence and the omission to give him a chance of doing so was an error of law. There is nothing to show that the evidence which he gave upon the question of immemorial user was intended to suffice for the trial of an issue on custom or even that the possibility of such an issue was present in his mind. The learned vakil for the respondent draws my attention to a sentence in the learned Munsiff's judgment which runs as follows :

"The evidence of P. W. 4 and P. W. 5 precludes the presumption of a *gopath* or path by dedication, custom or immemorial user."

In my opinion these words are not sufficient to establish that the question of custom was directly and substantially litigated before him. I think therefore that there must be a remand. It is necessary to note that the learned Subordinate Judge is right in holding that the obstruction complained of is a continuing wrong and that the learned Munsiff's view that the claim to a width in excess of the existing path is barred, contravenes the provisions of section 23, Limitation Act. It will be open therefore to the Lower Courts to determine what is the width of way to which a customary right has been established.

The learned Subordinate Judge's decree will be set aside and the case remanded to him with a direction that he will send down

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the 2nd and 3rd issues framed by him to the Court of 1st instance for a finding returnable within two months of the record reaching the latter Court. It will be open to both parties to adduce such additional evidence as they may require. On receipt of the 1st Court's finding the lower appellate Court will dispose of the appeal without delay.

It is admitted by both sides before me that no other issues are open and that if the plaintiff fails to prove the custom alleged his whole suit must be dismissed. Costs will abide the result.

Against this decision, the plaintiffs and defendants preferred appeals under section 15 of the Letters Patent.

Babu Upendra Kumar Roy for the Appellants in No 24 and the Respondents in No. 25.

Maulvi Nuruddin Ahmed for the Respondent in No. 24 and the Appellant in No. 25.

The judgments of the Court were as follows:

May, 26.

Sanderson, C. J.—In these cases the issue which is material for us to consider was framed in the court of first instance in this way, "Have the plaintiff and his co-villagers their alleged right of way by necessity, grant or prescription." Evidence was taken with regard to that issue. When the cases came before the learned Judge in the first appellate Court, he came to the conclusion that the issue which was really material had not been stated in the Court below; and, consequently he framed the issue himself which was in these terms, "Have the plaintiffs acquired the right of user over the disputed path by virtue of any custom." He purported to act under Order 41, Rule 24, Civil Procedure Code, which I need not read: but he purported to deal with it as the re-settling of the issues: and, thereupon, as he thought, having re-settled the issues, he dealt with the cases upon the evidence as it stood, without taking any further evidence or remanding the cases for further evidence. In my judgment, with great respect to the learned Judge, I think he made a mistake. I do not say for a moment that he made a mistake when he said that this was the real issue between the parties. What I mean by saying that he made a mistake, is that he did not realise that he was not re-settling the issues, but was framing an entirely new issue which was quite different from any one of those which were tried by the learned

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Munsiff. Therefore he came within Order 41, Rule 25, Code of Civil Procedure which runs in these terms "where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact which appears to the Appellate Court essential to the right decision of the suit upon the merits." That is what the learned Judge thought in these cases. Evidently he came to the conclusion that that was the issue which was essential for the right decision of the cases—then what were his powers? "The appellate Court may, if necessary, frame issues and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required." I think that is the course which the learned Judge ought to have taken.

Mr. Justice Mullick has directed as follows:—"The Subordinate Judge's decree will be set aside and the case will be remanded to him with a direction that he would send down the 2nd and 3rd issues framed by him to the Court of first instance for a finding returnable within two months of the record reaching the latter Court. It will be open to both parties to adduce such additional evidence as they may require. On receipt of the first Court's finding the lower Appellate Court will dispose of the appeal without delay." I think that is a proper and right order to make in these cases. The result will be that in my judgment both these appeals will be dismissed and Mr. Justice Mullick's order will stand. Inasmuch as neither side has succeeded, there will be no order for costs of these appeals.

Mookerjee, J.—I agree.

A. T. M. *Letters Patent Appeals dismissed: Case remanded.*

Before Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

HADISH BEPARI

v.

BOGAMULLA SHEIKH.*

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January, 19, 31.

Mahomedan Law—Guardianship of minor daughter—Father or mother's mother, preferential claim of—Minor daughter, marriage of—Guardianship for

* Appeal from Order, No. 442 of 1914, against the order of J. F. Graham Esq., District Judge of Assam Valley Districts, dated the 20th May, 1914.

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contracting marriage—Father's rights under the Mahomedan Law, if affected by an order under the Guardian and Wards Act.

According to Mahomedan Law the father has a preferential claim over the mother's mother to be the guardian of the property of his minor daughter, whereas the latter has according to the Sunni School of Mahomedans a preferential claim over the former to the custody of the infant on the death of the mother.

The mere fact that the father has not been appointed the guardian of his minor daughter's person in no way diminishes his rights as a father under the Mahomedan Law to give the daughter in marriage. The rules as to guardianship for contracting marriage on behalf of a minor depend exclusively upon Mahomedan Law, and therefore are not affected by any order under the Guardian and Wards Act.

Appeal by the Petitioner under the Guardian and Wards Act.

The appeal is against an order refusing the application of the Appellant to be appointed the guardian of the person and property of his minor daughter.

The other material facts will appear from the judgment.

Babu Kshitish Chandra Chuckerbutty (for *Mr. N. C. Bardaloi*) for the Appellant.

No one for the Respondent.

C. A. V.

January, 31.

The judgment of the Court was as follows:

This is an appeal against an order refusing the application of the appellant to be appointed and declared guardian of the person and property of his minor daughter under the Guardians and Wards Act 1890. The learned District Judge has refused the application on the ground that according to the Sunni School of Mahomedans, which prevails in this case, the mother's mother has a preferential claim over the father to the custody of an infant on the death of the mother and also on the ground that it will be in the best interests of the minor that she should remain for the present with her mother's relations. These are good grounds for refusing the appellant's application to be appointed guardian of the person of the minor but no sufficient reason has been given why he should not be declared guardian of her property. According to Mahomedan Law he has a preferential claim to be the minor's guardian for this purpose. Though the Guardian and Wards Act gives to the Judge the power of appointing anybody, section 17 (2) lays down rules which brings the provisions of the Act into line with those of the Mahomedan law. We are told that the real dispute between the parties is about the right to give the girl in marriage. It is sufficient to remark that the refusal to appoint the appellant

guardian of his daughter's person in no way diminishes his rights as a father under the Mahomedan law in this respect. The rules as to guardianship for contracting marriage on behalf of a minor depend exclusively upon Mahomedan law and therefore are not affected by any order made under the Guardian and Wards Act.

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We accordingly allow this appeal in part and declare the appellant Hadish Bepari to be the guardian of the property of his minor daughter Gul Banu who was born in Sraban 1320 B. S. The respondent did not appear and we make no order as to costs.

A. N. R. C. *Appeal allowed in part.*

Before Mr. Justice Fletcher and Mr. Justice Smither.

PIRAN BIBI AND OTHERS

v.

JITENDRIYA MOHAN MUKHERJEE AND ANOTHER.*

CIVIL. 1917. *March*, 19.

Civil Procedure Code (Act V of 1908), O. 21, r. 2, O. 34, r. 5—Mortgage suit—Preliminary decree—Payment out of Court, uncertified—Court, if can recognise such payment at the time of passing the final decree.

In passing a final decree under Order 34, r. 5 of the Code of Civil Procedure in a suit for sale to enforce a mortgage, the Court has no discretion except to follow the statutory form of the decree when no payment has been made into Court.

Where, therefore, after the passing of a preliminary decree a payment has been made out of Court which has not been certified as required by O. 21, r. 2 of the Code, the Court cannot recognise such a payment at the time of passing the final decree.

Appeal by the Defendants.

On the 8th April, 1911, plaintiffs applied to have a preliminary mortgage decree, for Rs. 130, obtained by them against the defendants on the 29th July, 1908, made absolute, no payment having been made in satisfaction of the decree. The decree was made absolute *ex parte* on the 6th May, 1911. The defendants filed an application on the 8th May, 1913, to have the said order absolute set aside for non-service of notice; and the order for decree absolute was set aside, and the case was restored on the 28th July, 1913.

* Appeal from Appellate Decree, No. 19 of 1915, against the decree of D. H. Seaton Esq., District Judge of Murshidabad, dated the 18th May, 1914, reversing that of Babu Khitipati Nath Mitra, Munsiff at Berhampur, dated the 22nd September, 1913.

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Piran Bibi v. Jitendriya.

The defendants filed an objection to the effect that the plaintiffs amicably received the decretal amount and granted them a receipt for the same, and as such the decree absolute could not be passed in the suit.

The Court of first instance having held that there could be no legal bar to the defendants putting in their plea of payment at that stage of the suit, and that the plaintiffs having received a sum of Rs. 100 in cash and a bullock in full satisfaction of their claim, were not entitled to anything from the defendants at the time of their filing the application for decree absolute, dismissed the application for decree absolute. On appeal, the learned District Judge held that the payment, if true, could not be recognised in those proceedings as it was not certified under O. 21, r. 2 of the Code of Civil Procedure, and made the decree absolute.

Against that decision the defendants appealed to the High Court.

Babu Anilendra Nath Roy Chaudhury for the Appellants.

Babu Jogesh Chandra Roy and *Babu Kshetra Mohan Ghose* (for *Babu Kalidas Sarkar*) for the Respondents.

The following judgments were delivered :

March, 19.

Fletcher, J.—This is an appeal by the defendants against a judgment of the learned district Judge of Murshidabad, dated the 18th May 1914, reversing the decision of the Munsiff at Berhampore. The appeal is preferred in main against a decree absolute made in a suit to enforce a mortgage security by way of sale. The defendants are now in the shoes of the mortgagors who were their predecessors-in-title. The plaintiffs are the sons of the original mortgagee. The suit was brought by the plaintiffs to enforce the mortgage and, on the 10th August, 1908, a preliminary decree for Rs. 130 was made by the first Court. An application was then made on the 8th April, 1911, for a decree absolute and the decree was made absolute *ex parte* on the 6th May, 1911. Subsequently, that *exparte decree* was set aside and the case was brought on for rehearing. The case set up by the defendants who are now the mortgagors was that more than three years ago they had paid the whole of the amount awarded by the preliminary decree out of Court to the plaintiffs. The learned Judge of the lower appellate Court held that, as the payment had not been certified to the Court, under the provisions of Order XXI, rule 2, the Court could not recognize it. Against that the present appeal has been brought.

Under the terms of Order XXXIV, Code of Civil Procedure, the scheme stated generally is that, in a suit to enforce a mortgage, the money payable to the mortgagee under a decree for foreclosure

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or sale or redemption should, in the first instance, be paid into Court and the method of payment to the mortgagee as is authorized by the Transfer of Property Act has been abolished. In a suit for sale, as appears from Order XXXIV, rule 5, when on the day fixed the defendant pays the amount into Court, the Court shall pass a decree as mentioned in that rule ; but, when such payment is not made into Court on or before the day fixed, the Court shall, on an application made by the plaintiff, pass a decree that the mortgaged property or a sufficient part thereof be sold. Therefore, in passing the final decree, the Court has no discretion except to follow the statutory form of the decree when no payment has been made into Court as mentioned in Order XXXIV, rule 5 and the only other matter that there can be is that the Court may hold that the suit has been adjusted under Order XXI, rule 2 of the Code of Civil Procedure. It is said that any other Court not being an executing Court can recognize an uncertified payment made out of Court. I am not prepared to agree with that. It seems to me that the whole of the provisions of the law providing a certification either by the decree-holder or by the judgment-debtor within the period within which the certification is to be made would be rendered nugatory if a defendant in a suit years after when the evidence would neither be afresh nor perhaps available is allowed to come forward and say that he has satisfied this preliminary decree out of Court three years ago by paying the money to the plaintiff. It seems to me that it will be opposed both to the terms of the Civil Procedure Code and also to the provisions of the Indian Limitation Act. The view that the learned Judge of the lower Appellate Court took was, I think, correct. I am not prepared to disagree with the reasons that have been given and are to be found in a judgment of my own in another case. * That was a case under the Transfer of Property Act and the procedure under the provisions of Order XXXIV is essentially different from the procedure in a mortgage suit under the terms of the repealed section of the Transfer of Property Act. I think the learned District Judge was clearly right in the conclusion he arrived at that the Court could not recognize this payment which is said to have been made out of Court. The appeal, therefore, in my opinion, fails and must be dismissed with costs.

Smither, J.—I agree.

A. N. R. C. *Appeal dismissed.*

* [See also *Amlooh Chand Parrack* v. *Sarat Chunder Mukerjee* (1911) I. L. R. 38 Calc. 913.—*Rep.*]

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

CIVIL.
1916.
June, 22.

NAWAB BAHADUR OF MURSHIDABAD

v.

AHMAD HOSSEIN AND OTHERS.*

Suit, maintainability of—Bengal Tenancy Act (VIII of 1885), Secs. 105, 109—Bengal Tenancy Act, Sec. 111 A. Proviso, scope of—Suit for declaration that proceedings under Chap. X were fraudulent—Civil Court, jurisdiction of, if constructively excluded.

The proviso to section 111 A of the Bengal Tenancy Act applies only to a case where the record of rights has been framed in pursuance of an order made under section 101 sub-section (2) cl. (d), that is, to a case where a settlement of land revenue is being or is about to be made, and not to a case where the record of rights was prepared at the instance of a landlord under the provisions of section 101 sub-section (2) cl. (a).

Section 109 of the Bengal Tenancy Act is no bar to a suit for a declaration that the proceedings under Chap. X were vitiated by fraud.

Section 105 authorises the settlement officer, in the course of proceedings under section 105 for the settlement of fair and equitable rent, to investigate questions which would otherwise be determined at the instance of the aggrieved party in a suit instituted under section 106. But where the matters in controversy in the suit did not form the subject of investigation under section 105, the suit is not barred under section 109.

The jurisdiction of a Civil Court is not constructively excluded when a point has neither been raised nor decided under section 105 read with section 105 A.

To attract the application of section 109, it is essential that the Civil suit has for its subject a matter which has already formed the subject of an application under section 105.

Pandab v. *Ananda* (1); *Sashi* v. *Eshabar* (2) and *Sasi* v. *Aswini* (3) referred to.

A suit concerning a matter which was the subject of an application made and proceedings taken under section 105, *viz.*, a suit for a declaration that the defendant was not entitled to realise certain rent in respect of the land in suit, is not maintainable under section 109 in the civil Court.

Sheodhani v. *Maharani Beni Pershad* (4) followed.

Appeal by Defendant No. 1.
Suit for declaration.

* *Appeal from Order No. 569 of 1914, against an order of* W. A. Seaton Esq., District Judge of Murshidabad, dated the 20th August, 1914, reversing a decree of Babu Chandra Bhusan Banerjee, Subordinate Judge of Murshidabad, dated the 25th February, 1914.

(1) (1910) 12 C. L. J. 195.
(2) (1915) 19 C. W. N. 636.
(3) (1912) 19 C. W. N. 637.
(4) (1910) 16 C. L. J. 67.

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Nawab Bahadur of Murshidabad, v. Ahmad.

The material facts and arguments appear from the judgment.

Babus Hemendra Nath Sen, Sajani Kant Sinha and *Mahes Chandra Banerjee* for the Appellant.

Babu Panchanan Ghose and *Moulvi A. S. M. Akram* for the Respondents.

The judgment of the Court was delivered by

June, 22.

Mookerjee, J.—This is an appeal by the first defendant in a suit, for a two-fold declaration; *viz.*, *first*, that proceedings under chapter X of the Bengal Tenancy Act, commenced at his instance were fraudulent, *ultra vires* and void," and, *secondly*, that, if the proceedings were not vitiated by fraud, the plaintiffs were *maurasi mokurari* raiyats in respect of the disputed lands (and not tenure-holders as entered in the record of rights), that the lands formed distinct raiyati tenancies (and not one tenure), and that the defendant landlord was not entitled to realise Rs. 84 which had been assessed by the settlement officer as fair rent under section 105 of the Bengal Tenancy Act. The suit was defended on the ground, amongst others, that it was barred under section 109. The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal the District Judge has reversed that decision and has remanded the suit for trial on the merits. The present appeal is directed against this order of remand, and raises the question, whether the suit is maintainable notwithstanding the provisions of section 109.

Section 109 provides that, subject to the provisions of section 109A, a Civil Court shall not entertain any application of suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceedings taken, under sections 105 to 108 both inclusive. Before we determine the scope of section 109 and its effect when applied to the present suit, we may point out that the proviso to section 111A is of no assistance to the plaintiffs. That proviso applies only to a case where the record of rights has been framed in pursuance of an order made under section 101, sub-section (2), clause (d); that is, to a case where a settlement of land revenue is being or is about to be made; but in the case before us, the record of rights was prepared at the instance of the landlord under the provisions of section 101, sub-sections (2), clause (4). Consequently, we have to determine how the suit is maintainable notwithstanding the provisions of section 109.

It is plain that in so far as the plaintiffs ask for a declaration that the proceedings under chapter X were vitiated by fraud, section 109 does not present an effective bar. No question of fraud was

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the subject of the application under section 105; consequently, the suit, treated as a suit for relief on the ground of fraud, is maintainable. With regard to the alternative declaration, the appellants contend that as the questions for determination might have been made the subject of controversy in the proceedings under section 105, they cannot be investigated in the present suit. In our opinion, there is no force in this contention. Section 105A, no doubt, authorises the settlement officer, in the course of proceedings under section 105 for the settlement of fair and equitable rent, to investigate questions which would otherwise be determined at the instance of the aggrieved party in a suit instituted under section 106. But in the case before us no such question was raised or investigated in the proceeding under section 105. The reason assigned by the plaintiffs is that they were not apprised of the proceedings under chapter X and consequently did not appear before the settlement officer. Whether the tenants were or were not aware of the proceedings under chapter X, the fact remains that the matters now in controversy did not form the subject of investigation under section 105. Consequently, on a plain and literal reading of section 109, the position cannot be maintained that the present suit concerns a matter which has already been the subject of an application under section 105. The appellant, however, urges us to put a wider construction upon section 109. He contends that, as in a case where section 11 of the Code of Civil Procedure is applicable, a question which might and should have been raised is deemed to have been raised and decided, we should hold under section 109 that a matter has been the subject of an application under section 105, whenever it might, if the defendant had so chosen, have been raised and decided under section 105 read with section 105A. We are of opinion that this contention is unsound. If we were to accept the construction put forward by the appellant, we should have to read into section 109 words which are not to be found there; we cannot hold, on the analogy of the doctrine of constructive *res judicata* that the jurisdiction of the Civil Court has been constructively precluded even when a point has been neither raised nor decided under section 105 read with section 105A. In this connection we may observe that sections 105 and 109 were inserted in the Bengal Tenancy Act by Act III of 1898 B. C. Section 105A was subsequently introduced into the Bengal Tenancy Act by section 26 of Act I of 1907 B. C. But though the scope of section 105 was thus widened, and section 105A was included in section 109 the language of section 109 was left unaltered. If the Legislature had intended to adopt the view put

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forward by the appellant, the language of section 109, would, no doubt, have been suitably modified. As pointed out by this Court in a long line of cases, amongst them, in *Pandab Dowari Das* v. *Ananda Kishore* (1); *Sashi Bhusan* v. *Eshabar* (2), and *Sasi Bhusan Hazra* v. *Aswini Samantha* (3), to attract the operation of section 109, it is essential to establish that the civil suit has for its subject a matter which has already formed the subject of an application under section 105. These cases were decided before the introduction of section 105A into the Bengal Tenancy Act. But as the introduction of section 105A has not altered for our present purpose the scope of section 109, section 109 must now be construed in the same lines as before the introduction of section 105A. In this view, it is plain that in so far as the plaintiffs seek for a declaration that they are *maurasi makurari* raiyats and not tenure-holders and that the lands held by them constitute, not one tenure but distinct raiyati holdings, the suit is clearly maintainable. These matters did not form the subject of determination under section 105; indeed, the settlement officer, had enquired into the point at an antecedent stage, namely, when the record of rights was under preparation. The only matter for investigation in the proceeding under section 105 was the question of fair and equitable rent of the lands shown in the record of rights as held by the tenants as a tenure under their landlord. But in so far as the plaintiffs seek a declaration that the defendant is not entitled to realise Rs. 84 as rent in respect of the land in suit, the suit is clearly barred by section 109, for this question directly relates to a matter which had formed the subject of the application under section 105. This view is in accordance with that taken by this Court in the case of *Sheodhani Pandey* v. *Maharani Beni Pershad Koeri* (4). It is, consequently, superfluous to determine what the position of the plaintiffs will be if they succeed in this litigation and obtain the other declaration which they seek. It is conceivable that in such a contingency, if, notwithstanding their success, the landlords institute a suit for rent against them on the basis of the determination under section 105, they may be met successfully by a plea which need not be elaborated for the purposes of this suit.

The result is that the prayer for a declaration that the defendants are not entitled to get the assessed amount of *jama* of Rs. 84 will be struck out from the plaint. Subject to this alteration, the order for

(1) (1910) 12 C. L. J. 195.
(2) (1915) 19 C. W. N. 636.
(3) (1912) 19 C. W. N. 637.
(4) (1910) 16 C. L. J. 67.

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remand made by the District Judge will stand. As the appeal has substantially failed, the appellant must pay the respondents their costs in this Court.

A. T. M. *Decree modified.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

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July, 12.

AFSAR SHAIK AND ANOTHER

v.

SAURAVA SUNDARI DASI.*

Mortgage by conditional sale—Mortgagee obtaining possession for non-payment by the mortgagor of the mortgage money on due date—Sums realised, if to be applied in reduction of mortgage debt—Transfer of Property Act (IV of 1882), Sec. 76—Evidence Act (I of 1872), Sec. 92.

The plaintiff alleged in her plaint that she took possession of the mortgaged property, with the consent of the mortgagor, when the latter failed to pay the mortgage-money on the due date under a conditional mortgage deed :

Held, that, that did not alter the nature of the contract between the parties and transform the conditional mortgage into a usufructuary mortgage. The parties adopted a mode of satisfaction of the mortgage. Consequently no question arose as to the effect of section 92 of the Evidence Act.

Kamala v. *Babu Nundan* (1) and *Himmat* v. *Llewhellen* (2) referred to.

That the sums received by the mortgagee during her possession of the mortgaged property should be applied in reduction of the mortgage debt in view of the provisions of section 76 of the Transfer of Property Act.

Smyth v. *Simpson* (3); *Anandrav* v. *Ravji* (4) and *Ramshet* v. *Pandharinath* (5) distinguished.

That the title of the mortgagors could not be extinguished till a decree absolute had been made in a foreclosure suit properly framed for the purpose.

Rents and profits are, in the view of a Court of equity, incidents *de jure* to the ownership of the equity of redemption and the mortgagee in possession is bound to apply whatever profits he actually receives towards the satisfaction of the mortgage debt.

* Appeal from Appellate Decree, No. 2704 of 1913, against the decree of E. Panton Esq., District Judge of Murshidabad, dated the 14th May, 1913, reversing that of Babu Nani Gopal Banerjee, Munsiff of Berhampur, dated the 9th August, 1912.

(1) (1909) 11 C. L. J. 39. (2) (1885) I. L. R. 11 Calc. 486.
(3) (1850) 7 Moo. P. C. 205. (4) (1864) 2 Bom. H. C. R. 214.
(5) (1871) 8 Bom. H. C. R. A. C. J. 236.

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Afsar Shaik v. Saurava Sundari.

Appeal by the Defendants.

Suit for foreclosure of a mortgage by way of conditional sale.

The material facts appear from the judgment.

Babu Hemendra Nath Sen for the Appellant.

None for the Respondent.

The judgment of the Court was delivered by

July, 12.

Mookerjee, J.—This is an appeal by two of the defendants in a foreclosure suit. On the 2nd December 1908, the first defendant executed in favour of the plaintiff an instrument which was a mortgage by conditional sale within the meaning of clause (*c*) of section 58 of the Transfer of Property Act. The mortgagor ostensibly sold the mortgaged property on condition that on default of payment of the mortgage-money on the 14th May 1909, the sale would become absolute. The principal amount was Rs. 41 and carried interest at the rate of 37½ per cent. per annum. The document further recited that the mortgagor retained possession of the property. The case for the plaintiff is that the mortgage-money was not repaid on the due date, with the result that from the 15th May 1909, she entered into possession of the mortgaged property with the consent of the mortgagor. She continued in peaceful occupation till she was dispossessed by force on the 1st April 1912, by the third defendant who had meanwhile succeeded to the interest of the mortgagor. On the 12th April 1912, she instituted the present suit for foreclosure. She claimed to recover Rs. 41 as principal and Rs. 51-4 as interest therein from the date of the mortgage to the date of the institution of the suit, and prayed that the usual foreclosure-decree might be made as provided in Order 34 of the Civil Procedure Code. The defendants pleaded that the claim was entirely unfounded as the mortgage-debt had been fully satisfied by means of the profits received by the mortgagee during the period of her occupation of the mortgaged premises. The Court of first instance made a preliminary decree in the terms prescribed by the Code and directed the usual accounts to be taken. When accounts were taken, it transpired that the mortgage-debt, principal and interest, had been satisfied in full by the profits received by the plaintiff during her possession of the mortgaged properties. The result was that the trial Court ultimately dismissed the suit. Upon appeal that decree has been reversed by the District Judge, on the ground that section 92 of the Indian Evidence Act, precluded proof that the terms of the original mortgage were modified so as to change it into a usufructuary morgage. The defendants have

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appealed to this Court and have argued that this conclusion is based upon a complete misapprehension of the relative rights of the mortgagor and mortgagee. In our opinion this contention is well founded.

The plaintiff alleges in her plaint that she took possession of the mortgage property, with the consent of the mortgagor, when the latter failed to pay the mortgage-money on the due date. It is a mistake to suppose that this altered the nature of the contract between the parties and transformed the conditional mortgage into a usufructuary mortgage; what happened in essence was that the parties adopted a mode of satisfaction of the mortgage [*Kamala* v. *Babu Nundan* (1); *Lala Himmat* v. *Llewhellen* (2)]; consequently no question arises as to the effect of section 92 of the Indian Evidence Act. The real point in controversy is, whether the sums received by the mortgagee during her possession of the mortgaged premises must be applied by her in reduction of the mortgage debt. The answer must be in the affirmation in view of the provisions of section 76 of the Transfer of Property Act. Clause (*h*) of that section provides that where, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, his receipts from the mortgaged property, shall, after deducting the expenses mentioned in clauses (*c*) and (*d*) [that is, revenue, public charges, rent, and cost of repairs], and interest thereon, be debited against him in reduction of the amount, if any, from time to time due to him on account of interest on the mortgage money, and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money. It is perfectly plain that the plaintiff took possession during the continuance of the mortgage, for the default of the mortgagor to pay the mortgage money on the due date, did not extinguish the equity of redemption and transform the title of the mortgagee into full ownership. The plaintiff cannot but be deemed to have taken possession as mortgagee without any reasonable ground for belief that he was entitled to hold in a different capacity: [*Parkinson* v. *Hanburg* (3); *Gaskell* v. *Gosling* (4)]. The case does not fall within the class of decisions, where the mortgagee has been led into an honest belief that upon non-payment by the mortgagor of the money at the time fixed, he became the absolute owner of the property: [*Smyth* v. *Simpson* (5); *Anandrav* v. *Ravji* (6); *Ramshet* v. *Pandharinath* (7)]. There was

(1) (1909) 11 C. L. J. 39.
(2) (1885) I. L. R. 11 Calc. 486.
(3) (1867) L. R. 2 H. L. 1.
(4) (1896) 1 Q. B. 669 (691).
(5) (1850) 7 Moo. P. C. 205.
(6) (1864) 2 Bom. H. C. R. 214.
(7) (1871) 8 Bom. H. C. R. A. C. J. 236.

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a valid mortgage in existence and in full operation when the mortgagee took possession; this, indeed, has been the common case of both the parties. The title of the mortgagors could not be extinguished till a decree absolute had been made in a foreclosure suit properly framed for the purpose. On the other hand, as the mortgagee, in the present litigation, claims interest for the full period between the execution of the mortgage and the institution of the suit, such claim can be sustained only on the theory that she has throughout this period retained the character of mortgagee. She is consequently bound to appropriate the profits, as mortgagee in possession, in reduction of the mortgage debt, on the principle recognised by the Judicial Committee in *Raja Papamma* v. *Vira Pratapa* (1); and by this Court in *Ramavatar* v. *Tulsi Prosad* (2); [*Robertson* v. *Norris* (3)]. The true position is that the rents and profits are, in the view of a Court of equity, incidents *de jure* to the ownership of the equity of redemption, and the mortgagee in possession is bound to apply whatever profits he actually receives towards the satisfaction of the mortgage debt.

If the contrary view were adopted, the result would be that the mortgagee would be allowed interest in addition to the profits retained by her, a position which cannot be justified on any conceivable ground of justice, equity and good conscience. We are clearly of opinion that the decree made by the trial Court could not be successfully impeached; nothing was due to the plaintiff at the date of the institution of the suit, for the report of the Commissioner who took the accounts has never been challenged.

The result is that this appeal is allowed and the decree of the Court of first instance restored. The suit will thus stand dismissed with costs in all the Courts.

A. T. M. *Appeal allowed: Suit dismissed.*

(1) (1896) I. L. R. 19 Mad. 249; L. R. 23 I. A. 32.
(2) (1911) 14 C. L. J. 507.
(3) (1858) 1 Giffard 421.

CRIMINAL REVISION.

Before Sir Lancelot Sanderson, Knight., Chief Justice, and Mr. Justice Newbould.

CRIMINAL.

1916.

August, 31.

September, 1.

RAJ CHANDRA BHUIYA

v.

EMPEROR.*

Sessions Judge, application to—Refusal by the Sessions Judge to refer the case to High Court—Revision, by High Court—Time, within which application to High Court to be made—Practice.

Where an accused person makes an application by way of motion to the Sessions Judge against an order of a Subordinate Court, and the Sessions Judge refuses to refer the case to the High Court, an application for revision to the High Court should be made within 60 days from the date of the conviction or the order complained of, but the time which is occupied in prosecuting with due diligence the application before the Sessions Judge and obtaining his decision should be added to the 60 days, just in the same way as the time necessary for obtaining copies.

Kshetra Mohon Giri v. Darpanarain Giri (1) referred to.

This rule of practice will in future be acted upon in the High Court. The rule is not an inflexible rule, and the Court has reserved to itself the power, when exceptional circumstances are proved, to depart from it.

Criminal Revision.

The petitioner prayed that the order of the Deputy Magisrrate of Noakhali, dated the 18th April, 1916, convicting him under sections 447 and 426 Indian Penal Code, and sentencing him to pay a fine of Rs. 13 under section 447 Indian Penal Code and Rs. 12 under section 426 Indian Penal Code (*i.e.*, Rs. 25 in all) or in default to undergo rigorous imprisonment for 20 days, *i.e.*, 10 days for each head might be set aside. It appeared that on the 22nd May, 1916, an application was made to the Sessions Judge for referring the case to the High Court for revision and the application was rejected on the 29th May. The petitioner then obtained the Rule from the High Court on the 26th July, 1916.

Babu Bhagirath Chandra Das for the Petitioner.

Babu Ram Doyal De for the Opposite Party.

* Criminal Revision No. 788 of 1916, against the order of Mr. S. P. Bakshi, Sessions Judge of Noakhali, dated the 29th May 1916, and the order of Babu Chandra Sekhar Mukherjee, 1st Class Deputy Magistrate of Noakhali, dated the 18th April, 1916.

(1) (1916) 20 C. W. N. 1170.

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September, 1.

The judgment of the Court was delivered by

Sanderson, C. J—This was a Rule obtained by the petitioner to show cause why the conviction and sentence complained of should not be set aside.

The conviction was on the 18th of April, 1916. On the 22nd of May 1916, an application by way of motion was made to the learned Sessions Judge asking that he would refer the case to the High Court. On the 29th of May, the learned Sessions Judge dismissed that application. On the 26th of July a Rule was obtained in this court by the petitioner, calling upon the District Magistrate to shew cause why the conviction of the 18th April should not be set aside, In connection with this matter a question of practice arises. The rule which was laid down in accordance with the established practice of this Court was as follows: (It is reported in the case of *Kshetra Mohan Giri* v. *Darpa Narain Giri* (1))—"The well-known practice is that an application for revision must be made within sixty days from the date of the order complained of. The Court has allowed an addition, to the sixty days, of the time which is necessary for obtaining copies. This is not a question of limitation but a rule of the practice of the Court to the effect that an application for revision must be made within a reasonable time." I do not think that at the time of the pronouncement of the Court's order the particular point mentioned in this case was present to our mind. The point is whether in a case in which there has been an application to the Sessions Judge as in this case, the sixty days are to be counted from the refusal of the Sessions Judge to refer the matter to the High Court or whether the time is to be ascertained by counting the days from the date of the order complained of. I have made enquiries from the learned Judges who have had experience in dealing with matters in the Criminal appeal Court. They are of opinion that there is no definite practice upon this particular point. But they are of opinion that the practice should be definitely decided. Therefore, we propose to lay down what ought to be the practice of this Court in such cases, and what I think will be considered to be a reasonable practice. But before doing so I desire to say that this is not a question of limitation; it is merely a matter of practice and it is made not only for the purpose of the administration of the business of the Courts but also in the interests of the accused persons themselves. It is most undesirable that a question of revision should be allowed to be unduly delayed. An application for

(1) (1916) 20 C. W. N. 1170.

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revision ought to be made at the earliest possible moment. It is also to be stated that the rule is not an inflexible rule, and that this Court has reserved to itself the power when exceptional circumstances are proved, to depart from it.

What we think ought to be the practice in a case of this kind where the accused person makes an application to the Sessions Judge and the Sessions Judge refuses to refer the case to this Court is this: The sixty days shall be counted from the date of the conviction or the order complained of, but the time which is occupied in prosecuting with diligence the application before the Sessions Judge and obtaining his decision should be added to the sixty days, just in the same way as the time necessary for obtaining copies.

Of course, when the learned Judge accepts the application and refers the matter to the High Court there is no difficulty. It only arises when the application of the accused person who has to go in the first instance to the Sessions Judge, is refused. In that case I think that it is only reasonable that the time which is occupied by his making that application with due deligence and getting it disposed of by the Sessions Judge should not be included in counting the sixty days; or to put it in the other way, that time should be added to the sixty days. For instance, in this case the motion to the learned Sessions Judge was made on the 22nd of May, and it was disposed of on the 29th of May: therefore, there were 8 days, (the first and the last day being included) occupied in making the application to the Sessions Judge, and the applicant would have sixty-eight days from the date of the order complained of, to come to this Court.

I trust I have made the matter plain. In future that will be the practice which will be acted upon in this Court.

Inasmuch as there was some doubt about this matter, we do not dismiss the present application on that ground, though we think that the delay in this case was unreasonable, because the conviction was on the 18th of April 1916, and only 8 days were occupied with regard to the motion to the learned Sessions Judge, and yet this Rule was not applied for until the 26th of July, more than three months after the date of conviction.

With regard to the merits, we have come to the conclusion that this is not a matter in which we ought to interfere, and that therefore this Rule must be discharged.

We direct that copies of this judgment be forwarded to the District Judges, for the information and guidance of the members of the legal profession, with the intimation that the Rule of practice here laid down will come into force from the 1st of November, 1916.

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A. N. R. C. *Rule discharged.*

PRIVY COUNCIL.

PRESENT: *Viscount Haldane, Lord Shaw, Lord Parmoor, Sir John Edge and Mr. Ameer Ali.*

P. C.

1917.

March, 8.

MAHARAJA MANINDRA CHANDRA NANDI

v.

RAJA SRI SRI DURGA PRASHAD SINGH.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Construction of a deed—Evidence of intention of parties not admissible—Privy Council—Practice—Fresh point.

In construing the terms of a deed evidence of the intention of the parties thereto is inadmissible; for the question is not what the parties may have intended, but what is the meaning of the words which they used.

On appeal to the Judicial Committee, in the absence of any exceptional conditions, it is not open to a party to raise a fresh point, which, though raised in the pleadings and in the reasons attached to his case lodged in the Privy Council, is not raised at the hearing either before the Subordinate Judge or in the High Court.

Durga Prashad Singh v. *Gosta Behari Nandi* (1) affirmed.

Appeal from a judgment and decree of the High Court (1) (Mookerjee and Beachcroft JJ.) at Calcutta (August 22, 1912) substantially varying a judgment and decree of the Court of the Subordinate Judge of Manbhum (September 8, 1909).

The suit giving rise to the appeal was brought by the respondent against the appellant and another for the recovery of royalties at an enhanced rate under the *kabulyat*, dated the 20th October 1908, the material portion of which is set out in the judgment of their

(1) (1912) 17 C. L. J. 53.

P. C.
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Durga Prashad.

Lordships. The plaintiff alleged that mouzah Ekra was a portion of his zemindari; that his predecessor had granted the underground and coal mining rights to the appellant's benamidar; that at the date of the lease the only communication with the district of Jherria was by the East India Railway Company's line but a new route to Calcutta was then in contemplation to be constructed by the Bengal Nagpur Railway Company; that the parties entered into the said agreement for enhanced rate because of their impression that when the new route by the Bengal Nagpur Railway was open the freight for coal to Calcutta would be reduced and consequently the appellant's profits would be increased, that on August 3, 1902, the freight was reduced by more than 2 annas per ton, and consequently he was entitled to the enhanced rate of royalty under the terms of the *kabulyat*.

The appellant denied that the respondent was entitled to any royalty at an enhanced rate under the terms of the *kabulyat*, and contended *inter alia* that the clause as to enhanced rate could not and did not apply to the despatches of coal by the East India Railway, or to any despatches except those by the Bengal Nagpur Railway at rates lower than those charged on the East India Railway, or to cases of delivery at any port or station other than Calcutta. He further contended that at the time of the execution of the *kabulyat* the freight for the carriage of coal to Calcutta by the East India Railway was Rs. 3-11-0 per ton at the Railway's risk, but the new rate on both railways was Rs. 3-2-0 at owner's risk, and the rate at the risk of the railway companies was even higher than Rs. 3-11-0. He alleged that practically the whole of the coals was despatched to Calcutta by the East India Railway Company.

It appeared that at the time of the execution of the *kabulyat* the freight for the carriage of coal to Calcutta by the East India Railway was Rs. 3-11-0 per ton, which was reduced in August 1902 to Rs 3-2-0. In February 1903, the Bengal Nagpur Railway was extended to Jherria. The new line made still further reductions in the rates, but the authorities of both lines soon came to a settlement and fixed Rs. 3-2-0 per ton as the freight for the carriage of coal to Calcutta on their respective lines.

The Subordinate Judge settled several issues and recorded oral and documentary evidence to show the intention of the parties to the *kabulyat*. He decided against the respondent's contention holding that by the clause in question the appellant was not under liability to pay enhanced royalty in respect of coal carried by the East

India Railway, even if its rates of freight were reduced, and that the said clause only related to coal despatched by the Bengal Nagpur Railway and only came into force if the rate of freight on that Railway was less than that of the East India Railway. On appeal to the High Court that decision was reversed (1): Mookerjee and Beachcroft, JJ., held that in construing the clause in question the Subordinate Judge was wrong in relying upon evidence of the intention of the parties, that the clause applied generally to any reduction of freight, whether of the East India Railway, or the Bengal Nagpur Railway, or both; and that as the freight was admittedly reduced by more than 2 annas the respendent's claim must be decreed. For a report of the judgment see *Durga Prashad Singh* v. *Gosta Behari Nandi* (1).

De Gruyther, *K. C.*, and *Dunne*, for the Appellant: The true construction of the clause is that for all coals despatched by the East India Railway royalty would be paid at the fixed rate of 3 annas per ton, irrespective of any alteration in the freight charges. The provision as to an enhanced rate of royalty only applied to coals which might be despatched by the Bengal Nagpur Railway then in contemplation, when completed, and at a lower rate of freight than that charged by the East India Railway. It is therefore submitted that inasmuch as the whole of the coals in question was despatched by the East India Railway the respondent is not entitled to any enhanced rate of royalty.

There has been no reduced rate of freight within the meaning of the clause, inasmuch as the present rate of Rs. 3-2-0 is based upon a special risk note signed by the consignor providing that the coal is carried at the owner's risk only, whereas the former rate of Rs. 3-11-0 was at the railway's risk, and the rate at railway's ri k is still higher than Rs. 3-11-0. The contingency upon which an enhanced rate becomes payable under the *kabulyat* has not yet arisen.

(*Upjohn* took objection that this was a new point which could not be now raised.)

It was raised in the written statement and both parties have given evidence bearing on it. The Subordinate Judge disallowed the respondent's claim on other grounds, and consequently it was not necessary for him to decide it The appeal to the High Court was by the present respondent, and though the present appellant filed a memorandum of cross-objections, he was not bound to raise the point therein as he then being the respondent could have argued the point without raising it by way of cross-objection: See Code of

(1) (1912) 17 C. L. J. 53.

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Manindra Chandra v. Durga Prashad.

Civil Procedure, 1908, (Act V of 1908), Order 41, rule 22. (Reference was also made to the Indian Railways Act (IX of 1890), section 72.)

Upjohn, K. C., Sir W. Garth, J. M. Parikh and *J. K. Roy*, for the Respondent, were not heard.

The judgment of their Lordships was delivered by

March, 8.

Lord Parmoor :—The only question raised in this appeal is whether, under the terms of a *kabuliyat*, the respondent is entitled to an enhanced rate of royalty from the appellant. The respondent is the Raja of Jherria, and the village of Ekra is a portion of his estate. His predecessor in title, on the 20th October, 1898, granted the underground and coal-mining rights in the village of Ekra to the appellant. At that date the only railway communication with the district was afforded by the line of the East Indian Railway Company, but a new route to Calcutta, to be constructed by the Bengal Nagpur Railway Company, was under consideration.

The first clause of the said *kabuliyat*, which fixed the royalty to be paid, was translated by the Subordinate Judge as follows :—

"The royalty payable would be 3 annas per ton of steam coal, steam rubble, hard and soft coke, and 1 anna 6 pies per ton of brick-burning rubble and dust, raised and despatched or sold by me : Be it understood that in respect of all coals despatched by the East Indian Railway Company royalty would be paid at the present fixed rates, but if, in future, the Bengal Nagpur Railway being constucted, the freight on coal is reduced by 2 annas or more per ton, then on all coals despatched in the aforesaid manner (*ukta rupey*) at reduced (*Kom*) rates royalty would be paid at 5 annas per ton of steam coal, steam rubble, hard and soft coke, and 2 annas 6 pies per ton of brick-burning rubble and dust, but if the aforesaid railway freight be reduced by less than 2 annas per ton, then the royalty for steam coal, steam rubble, hard and solf coke would be increased by the amount by which the freight on coal is reduced, and that for brick-burning rubble and dust by one-half of that amount.

This translation was followed by Mr. Justice Beachcroft, and it was claimed on behalf of the appellant that it was more accurate than the official translation attached to the papers. It is not necessary, in their Lordships' opinion, to go further into this question. Accepting the translation which the appellant claims to be more accurate, their Lordships are of opinion that the judgment and decree of the High Court are correct, and that the case for the appellant fails.

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The royalty clause fixes a royalty of 3 annas per ton of steam coal, steam rubble, hard and soft coke, and of 1 anna 6 pies per ton of brick-burning rubble and dust, raised and despatched or sold by the lessee. These latter words are important in construing the clause. A contrast is drawn between coal or rubble despatched and coal or rubble sold at the pit's mouth, and the claim for an enhanced royalty on coal is made in respect of coal despatched by rail. It does not appear, and it is not material, whether at the date of the lease any coal was despatched in any other way than by rail. The only railway which served the coal-field at the date of the lease was that of the East Indian Company The clause provides that royalties at the present fixed rate should be paid on all coal despatched by the East Indian Company, subject, however, to a future contingency:—

"But if, in future, the Bengal Nagpur Railway being constructed, the freight on coal is reduced by 2 annas or more per ton, then on all coals despatched in the aforesaid manner (*ukta rupey*) at reduced (*Kom*) rates royalty would be paid at 5 annas per ton of steam coal, steam rubble, hard and soft coke, and 2 annas 6 pies per ton of brick-burning rubble and dust."

The Bengal Nagpur Railway has been constructed, and it has been correctly held in both Courts that, as a consequence of this construction, a readjustment was made in the freight on coal. It was further assumed throughout the hearing, both before the Subordinate Judge and in the High Court, that, in the readjustment, the freight on coal had been reduced by more than 2 annas per ton as compared with the freight in operation on the East Indian Company's line at the date of the lease. On this finding and assumption the contingency on which an enhanced royalty would become payable has become operative, but it is said that this enhanced royalty is only payable in respect of coals sent over the Bengal Nagpur line and only so far as the Bengal Nagpur Railway Company charge a differential rate less than the rate charged by the East Indian Railway Company.

Their Lordships cannot find any reference to such a differential rate in the terms of the clause or any support for the argument of the appellant under this head. The decision of the Subordinate Judge is rested on evidence of the intention of the parties to the deed, but this evidence is clearly inadmissible. In construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words which they used.

Apart from any question of differential rate, it is clear from the context that the words "coals despatched in the aforesaid manner

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at reduced rates" cannot be restricted as applicable only to coals sent over the Bengal Nagpur system. At the date when the lease was executed, no coals had been despatched over the Bengal Nagpur system, and the deed speaks from the date of its execution. It might be argued that, grammatically, the words in question referred only to coals despatched by the East Indian Company, but this construction would be adverse to the contention of the appellant. If the words in question are not limited in their application to coals despatched by the East Indian Company, they must refer back to the earlier context in the clause and include all coals despatched by rail at a reduced rate, either by the East Indian Company or the Bengal Nagpur Company. Their Lordships are of opinion that this is what the words naturally mean, and agree in the judgment of the High Court.

At the hearing of the appeal, counsel for the appellant claimed to raise the question that in any event there had been no reduction of rate within the meaning of the clause, inasmuch as the old rate of rupees 3 : 11 was a company's risk rate, and the present rate of rupees 3 : 2 is based upon a special consignment note signed by the consignor, providing that the coal should be carried at owner's risk. This issue, though raised in the pleadings and in the reasons attached to the appellant's case on appeal, was not raised either before the Subordinate Judge or in the High Court. It was assumed in both Courts that a reduction in coal rates sufficient in amount to justify a claim for an enhanced royalty had been made within the meaning of the royalty clause. Under these circumstances, and in the absence of any exceptional conditions, their Lordships held that it was not open to the appellant to raise as a fresh point on appeal, an issue which should have been raised before the Subordinate Judge or the High Court, and might then have been raised in a convenient form and at an opportune time, and that there was no valid reason in the present case for departing from the established practice in the Privy Council.

In the opinion of their Lordships, the case for the appellant fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Watkins & Hunter :—Solicitors for the Appellant.

Edward Dalgado :—Solicitor for the Respondent.

J. M. P. *Appeal dismissed.*

PRESENT :—*The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.*

DEONANDAN PRASHAD SINGH

v.

RAMDHARI CHOWDHRI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

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November, 10.
December, 11.

Mahomedan Law—Pre-emption—Decree for pre-emption—Date from which title passes to pre-emptor—Mesne profits belong to original purchaser till purchase money is paid in full by pre-emptor—Code of Civil Procedure (Act XIV of 1882), Sec. 214.

A person claiming an order of pre-emption cannot be regarded in the same light as an ordinary purchaser of an estate. His right is, when an estate has been sold, to acquire the property from the purchaser at the price paid. If the necessary formalities are observed, and the purchaser assents to the claim, possession is given by mutual consent, but if the claim be disputed and suit must be brought, the rights of the parties are regulated by the Code of Civil Procedure, 1882, Sec. 214, which in this respect embodies the principle of the Mahomedan Law.

It therefore follows that where a suit is brought it is on payment of the purchase-money on the specified date that the plaintiff obtains possession of the property, and until that time, the original purchaser retains possession and is entitled to the rents and profits. It is only when the terms of the decree are fulfilled and enforced that the persons having the right of pre-emption become owners of the property. Such ownership does not vest from the date of sale: the actual substitution of the owner of the pre-empted property dates with possession under the decree.

Deokinandan v. Sri Ram (1), approved.

Appeals from two decrees of the Calcutta High Court (Brett and Sharfuddin JJ.), dated February 25, 1910, affirming in part and reversing in part a decree of the Subordinate Judge of Monghyr.

On June 30, 1898, two suits of pre-emption were instituted by the predecessors of Deonandan and Baijnath respectively, each claiming one half of Taluka Rasulpur Bhatowni. Plaintiffs alleged that the true sale consideration was Rs. 37,000, though Rs. 44,850 was shown in the sale deed. The Sub-Judge found this question in their favour, and gave each of them a decree for pre-emption for one half on payment into Court within one month of decree of Rs. 18,500. These moneys were duly deposited and on July 19, 1900, plaintiffs took possession. On appeal the High Court decided that the true sale consideration was Rs. 44,850: further, that plaintiffs were not entitled to pre-empt, inasmuch as the ceremonies necessary

(1) (1889) I. L. R. 12 All. 234.

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under Mahomedan Law had not been performed. They dismissed the suits, and in execution of their decrees the pre-emptors were dispossessed on July 20, 1904. The plaintiffs appealed to the Privy Council, which held that they had the right to pre-empt, but agreed with the High Court that the true consideration was Rs. 44,850. The material part of the Order in Council is cited in their Lordships' judgment.

Under this order the pre-emptors deposited a further sum of Rs. 7,850 and were restored to possession on January 19, 1909. Both sides then applied to the Subordinate Judge, the pre-emptors claiming mesne profits from July 20, 1904 to January 19, 1909, while Ramdhari Chowdhri (the original purchaser) claimed mesne profits from July 19, 1900 to July 20, 1904. The Sub-Judge allowed Ramdhari's claim and rejected that of the pre-emptors. On appeal the High Court (Brett and Sharfuddin JJ.) held that neither party was entitled to mesne profits and dismissed both applications. The material part of their judgment was as follows :—

"We think that, in ordering restitution, it would be inequitable and impossible for us to follow strictly the provisions of section 144 of the new Code of Civil Procedure. It is impossible, in our opinion, to say on the facts before us that the four years' possession by the present appellants, under the decrees of the Court of first instance or the five years' possession by the Chowdhris under the decrees of this Court, was wholly wrongful so as to entitle the other party to recover mesne profits from them for those periods. Nor was the possession of either of the two opposing parties wholly rightful. The result, however, has been, so far as the defendants, the Chowdhris, are concerned, that they have lost the interest on the price of the money which they have paid for nine years and they have been in possession of the property for five years. On the other hand, the plaintiffs, Babu Baijnath Goenka and Babu Deonandan Prashad, have lost interest on Rs. 37,000 for nine years, and have been in possession of the property for four years. In our opinion, the course which we ought to adopt in this case as most in accordance with fairness and equity is to try and see that each party is placed in the same position as he would have been if the period from the 19th July 1900, to the 19th January 1909, could be eliminated, or, in other words, to equalise the losses which each party has sustained.

"We have already stated what the losses and profits of each during the period have been. The proportionate losses may be calculated with regard to the capital sum on which during the nine

years the opposing parties have lost the interest, and we think that they may be roughly fixed between the appellants and the Chowdhris in the proportion of 4 to 5. The periods during which they held possession of the property have been in the same proportion. We think it would, in this case, be only fair and equitable to take the profits realized during the periods of possession as a fair compensation for the loss of interest sustained and, as the proportions of the losses and the profits are the same, we think that, in these circumstances the applications of both parties for mesne profits should be dismissed and that we should hold that both parties have received sufficient restitution for the loss which they have sustained by the enjoyment of the mesne profits for the periods during which they were in possession.

"We may observe that, in our opinion, substantially the same result would follow any attempt to give restitution to either of the parties under the provisions of section 144, Code of Civil Procedure. The right to mesne profits by way of restitution would be subject to the liability in the case of the present appellants to pay interest to the respondents on the sum of Rs. 44,850 for nine years, and in the case of the respondents to pay interest to the appellants on the sum of Rs. 37,000 for the same period. In each case, the sums to be paid and received would be substantially equal and may fairly be set-off the one against the other.

"We accordingly modify the decree of the Lower Court by setting aside the decree for mesne-profits passed in favour of the Chowdhris and confirming the order of dismissal of the applications of the plaintiffs for mesne profits. The result, therefore, is that appeals Nos. 537 and 538 are decreed and appeals Nos. 365 and 366 are dismissed. Having regard to the conclusion at which we have arrived, we direct that each party do bear his own costs in both the Courts."

Hence these appeals.

De Gruyther, *K. C.*, and *B. Dube* for the appellants: The question is under the Mahomedan Law as administered in British India, from what date the title passed to the pre-emptor. The Subordinate Judge, on consideration of Mahomedan Law, has decided against us: the High Court, on general principles, has found that both parties have suffered some loss and set off one claim against the other.

[The Lord Chancellor: If the Sub-Judge had found in the first instance that Rs. 44,000 was the figure, the only difference would

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have been that Rs. 7,000 more would have been locked up, and no one could have questioned your right to mesne profits].

Under the Indian law the title passes from the date of payment—the present law is Act V of 1908, Order 20, rule 14. In this respect the Civil Procedure Code merely gave statutory recognition to the existing Mahomedan Law—Baillie's Mahomedan Law, page 550. The title passed to us before July 1900: it passed from the date of payment of the price adjudged by the Subordinate Judge and has remained in us throughout. The respondents were merely in the position of an unpaid vendor.

A. M. Dunne for the Respondents: The pre-emptors had no right to get possession of the property without paying the whole price. The law of pre-emption must be strictly interpreted. The case is governed by section 214 of Act XIV of 1882, the Civil Procedure Code then in force. Under that section the Court must specify a day on or before which the purchase-money shall be paid and the decree shall declare that on payment of such purchase-money the pre-emptors shall obtain possession. The pre-emptor acquires the title on payment of the purchase-money and not before. The order in Council varied the original decree and the effect of that order was that a day was to be fixed on which the pre-emptors were to pay the purchase money. The rights of ownership vest in the pre-emptor from the date of payment in accordance with the final decree: *Deokinandan* v. *Sri Ram* (1).

The Subordinate Judge's decision on the point of law is correct: the High Court has erroneously applied general principles of rough justice.

De Gruyther K. C., in reply: The right of pre-emption is not a right of re-purchase either from vendor or vendee, involving any new contract of sale: but simply a right of substitution entitling the pre-emptor to stand in the shoes of the vendee: *Gobind Dayal* v. *Inayutullah* (2).

The Privy Council merely did what the High Court ought to have done. The whole litigation is due to respondents' refusal to take the Rs. 44,850 when we offered it to them.

The judgment of their Lordships was delivered by

December, 11.

The Lord Chancellor:—The question in these appeals affects the right to mesne profits of certain lands which, by virtue of three different sets of judgments—*first*, two decrees of the Subordinate Judge on the 31st March, 1900; *secondly*, two decrees of the High

(1) (1889) I. L. R. 12 All. 234.
(2) (1885) I. L. R. 7 All. 775 (809) F. B.

Court at Calcutta on the 20th January, 1904; and *thirdly*, an Order in Council on the 25th January, 1908—have been alternately in the possession of Deonandan Prashad Singh and Baijnath Ram Goenka or their predecessors in title (hereafter, for convenience, called the appellants), Ramdhari Chowdhri and others or their predecessors in title (hereafter called the respondents), and, finally, of the appellants again. The explanation of this changing occupation is to be found in the nature of the proceedings in which those orders were made.

On the 30th June, 1898, two suits were brought by the two predecessors of the appellants each claiming a right to pre-empt a half share in certain property known as Taluka Rasulpur Bhatowni, which, on the 17th December, 1897, one Anupbati Koeri sold to Nirbhoy Chowdhri. The sale was alleged by the purchaser to have been made for 44,850 rupees, and this amount was stated as the consideration in the deed of sale. The plaintiffs' right to pre-empt does not seem to have been questioned; the only matter in dispute was whether they had made, in accordance with the rules of the Mahomedan law to which the right is subject, the "demands," which are a condition precedent to the exercise of the rights of pre-emption. The plaintiffs alleged they had duly performed the necessary formalities and also that they had offered to pay the full purchase price. The purchaser, however, declined to recognise their rights, and it accordingly became necessary to institute proceedings. Unfortunately, in those proceedings, the plaintiffs challenged the reality of the purchase price named in the deed, and alleged that the real purchase price was 37,000 rupees, and not 44,850. The defendant denied the right of pre-emption, and asserted that the full consideration was the true consideration for sale. The plaintiffs succeeded on both their contentions, and, by the decrees of the 31st March, 1900, to which reference has been made, the Subordinate Judge ordered that each of the plaintiffs should, within one month from the date thereof, deposit in the Court 18,500 rupees half of the 37,000 rupees the price of the property claimed, and then be awarded possession of the half share of the property claimed by right of pre-emption. The money was duly paid by both the plaintiffs, and possession of the estate was delivered to them on the 19th July, 1900.

The judgment of the High Court reversed this judgment and set aside these decrees, declaring that there was no right of pre-emption, and that the full consideration for the sale was 44,500 rupees. Possession of the estate was accordingly re-delivered to the original purchaser on the 20th July, 1904.

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The Order of the Privy Council on appeal from the High Court was dated the 25th January, 1908; this declared that the right of pre-emption existed, and that the purchase price was that stated in the deed; accordingly the decrees of the High Court were discharged, and it was further ordered that the decrees of the Subordinate Jundge should—

". . . . be varied by calculating the price of pre-emption on the sum of 44,850 rupees instead of on the sum of 37,000 rupees and by ordering the amounts in question to be deposited by the respective appellants in the Court of the said Subordinate Judge within such times as the said High Court or the Court of the said Subordinate Judge may determine that subject to these variations and the payment to the appellants of additional costs (if any) properly incurred by them, the said decrees of the Court of the said Subordinate Judge be and the same are hereby remitted to the said High Court in order that the necessary steps may be taken for the disposal thereof on the above footing,"

It appears that during all this time the two sums of 18,500 rupees had remained in Court, uninvested as the appellants suggest, though their Lordships cannot but think it unlikely that so large a sum should be left idle during the whole long and indeterminate time of Indian litigation. Accordingly the plaintiffs were only bound to find the balance of 7,850 rupees, and this having been done the plaintiffs were restored to possession on the 19th January, 1909.

In working out the Order in Council, a question has naturally arisen as to the right to mesne profits between the 19th July, 1900, and the 19th January, 1909. The respondents, as representing the original purchaser, claim to be entitled to the whole mesne profits between these dates upon the ground that the appellants are only in possession under the order in Council. The appellants, on the other hand, assert their right because they urge they were rightly in possession under the original decrees, and that that possession was wrongfully taken away by the order of the High Court. The High Court, from whom the present appeal has been brought, have settled the matter by giving mesne profits during the one period to the appellants, and during the other period to the respondents. But though this order might be a fair way of adjusting the rival claims of the parties were they uncontrolled by statute, their Lordships are unable to find that they are free to deal with it in this manner.

A person claiming an order of pre-emption cannot be regarded in the same light as an ordinary purchaser of an estate. His right is, when an estate has been sold, to acquire the property from the

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purchaser at the price paid. If the necessary formalities are observed, and the purchaser asseents to the claim, possession is given by mutual consent and no difficulty arises; but if the claim be disputed and suit must be brought, the rights of the parties are regulated by the Code of Civil Procedure, which in this respect embodies the principle of the Mahomedan law. Section 214 of the Code of 1882 is in these words:—

"214. When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid the suit shall stand dismissed with costs."

It therefore follows that where a suit is brought it is on payment of the purchase money on the specified date that the plaintiff obtains possession of the property, and, until that time, the original purchaser retains possession and is entitled to the rents and profits. This was so held in the case of *Deokinandan* v. *Sri Ram* (1) and there Mr. Justice Mahmood, whose authority is well recognised by all, stated that it was only when the terms of the decree were fulfilled and enforced that the persons having the right of pre-emption become owners of the property, that such ownership did not vest from the date of sale, notwithstanding success in the suit, and that the actual substitution of the owner of the pre-empted property dates with possession under the decree.

Now, in the present case, the decrees under which possession was given of the pre-empted property are the decrees of the Subordinate Judge, not, indeed, those of the 31st March, 1900, but those decrees as varied by the order in Council of the 25th day of January, 1908, for at that date the original decrees of the Subordinate Judge had been set aside, and were only restored upon the terms mentioned in the judgment of the Privy Council. So varied, they provided that upon the deposit by each plaintiff of 22,425 rupees—half of the 44,850 rupees—he should then be awarded possession. Until that deposit was made possession could not be taken. If it had not been made, possession could never have been assumed at all, and, in their Lordships' opinion, it follows that the plaintiffs only obtained possession within the meaning of the Code in pursuance of that order, that is to say on the 19th January, 1909.

(1) (1889) I. L. R. 12 All. 234.

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Their Lordships fear that this opinion, to which they are compelled by the terms of the Code, may involve some hardship upon the plaintiffs; but it must be remembered that this is due to two matters, one of which was wholly and the other to some extent under the plaintiffs' control. The first and the fundamental error was in challenging the consideration for the sale. Apart from this, their possession would have been lawful throughout, and the order in Council would merely have confirmed the decrees of the Subordinate Judge and prevented the decree of the High Court from having any effect. But, apart from this, their loss might have been materially lessened had they proceeded with diligence in their appeal from the judgment of the High Court. This was given on the 21st January, 1904, and it was not till four years afterwards that the matter came before the Judicial Committee for decision, though there need be no delay in the hearing of appeals when once they are entered here. The 30th June, 1898, was the date when proceedings were commenced, and it is not until nearly ten years afterwards that the final decree is obtained. Their Lordships realise and desire to make full allowance for the difficulties due to translation of documents, printing, and preparation of the record, and all the circumstances attaching to habits and ideas different from their own; but delay in litigation means to every one concerned, in whatever country he may be, needless expense, anxiety, and disappointment, and to the poor and honest suitor it is an oppression hard to be borne.

In the result, therefore, the appellants fail and the respondents succeed. Their Lordships will therefore humbly advise His Majesty that the two decrees of the High Court, both dated the 25th February, 1910, made in Appeals Nos. 365 and 366 of 1909, should be affirmed, and that the two decrees of the High Court, both dated the 25th February, 1910, made in Appeals Nos. 537 and 538 of 1909, should be set aside except as to costs, and that the decrees of the Court of the Subordinate Judge dated the 28th August, 1909, should be restored except as to costs. It follows that the appellants' appeals should be dismissed and the respondents' cross-appeals allowed. As regards costs, the High Court ordered each party to bear their own costs in both the Indian Courts. This part of the High Court's order will not be disturbed, and there will be no costs in these appeals.

Watkins & Hunter:—Solicitors for the Appellants.

T. L. Wilson & Co.:—Solicitors for the Respondents.

J. M. P. *Appeals dismissed and cross-appeals allowed.*

PRESENT: *Lord Parker of Waddington, Lord Sumner and Sir Lawrence Jenkins.*

MOTI LAL AND OTHERS

v.

KUNDAN LAL AND ANOTHER.

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1917.
January, 27.
1916.
October, 27, 30, 31.
November, 2.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.]

Discovery—Account books—Failure to produce and account for them—Presumption.

Where it is the business of a *party* to a suit to produce, or account for books of account relevant to an issue, and, in spite of an order for discovery made on the party, he neither produces them nor gives any evidence of diligent search and of failure to find the books, even if the fact and date of their destruction, if any, cannot be proved, the presumption arises that the contents of the books not accounted for are, as regards the issue in dispute, unfavourable to that party.

Appeal against a judgment and decree of the High Court at Allahabad (December 5, 1912) reversing a judgment and decree of the Court of the Additional Subordinate Judge of Cawnpore (August 2, 1909).

The facts of the case are fully stated in the judgment of their Lordships. The suit was brought by the respondents against the appellants to recover from the latter a 12-anna share in a mouza called Hansi Mau. The Subordinate Judge dismissed the suit, but the High Court decreed it, and the defendants-appellants thereupon appealed to His Majesty in Council.

De Gruyther, K. C., J. M. Parikh and *J. K. Roy*, for the Appellants, submitted that the decision of the Subordinate Judge was right. They referred to *Tekait Doorga Persad Singh* v. *Tekaitni Doorga Konwari* (1) and *Sham Koer* v. *Dal Koer* (2).

Dube for the Respondents, supported the decision of the High Court, and during the course of the argument referred to *Rewa Prasad Sukal* v. *Deo Dutt Ram Sukal* (3), and the Code of Civil Procedure, (1882), sections 394 and 395.

No reply was called upon.

The judgment of their Lordships was delivered by

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January, 23.

Lord Sumner:—In this case the plaintiffs sued to recover proprietary possession with mesne profits of a 12-anna share in

(1) (1878) L. R. 5 I. A. 149 (157); I. L. R. 4 Calc. 190; 3 C. L. R. 31.
(2) (1902) L. R. 29 I. A. 132; I. L. R. 29 Calc. 664.
(3) (1899) L. R. 27 I. A. 39 (41); I. L. R. 27 Calc. 515.

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Mouza Hansi Mau, in the district of Cawnpore. They are members of a joint Hindoo family, the Tewaris, governed by Mitakshara law, and claim this mouza as part of their undivided property. The circumstances are such that the plaintiff's right, if any, has not been barred by adverse possession and lapse of time. It is convenient to speak of one defendant, Suraj Kunwar, though there are others, his vendees. The property is small; it seems to yield 500 rupees per annum, but it has been fought for at prodigious length and cost.

In the first instance the burden of proof was on the plaintiffs, but they produced a conveyance, dated the 3rd August, 1863, under which the property in question was conveyed on sale to Musammat Babbo Kunwar, guardian of her son Suraj Parshad, then a minor, both being members of the Tewari family. There was also evidence that the purchase consideration was provided out of joint funds. The rights of Suraj Parshad have now descended to the plaintiffs, and it is not contended that Musammat Babbo Kunwar took any interest for herself. The defendant produced no conveyance in his own favour, but claimed that the purchase of 1863 was in truth a *benami* transaction for the separate benefit of his wife, to whose rights he succeeded when she died in 1871. Thus the burden of proof passed to the defendant very early in the case.

His story was this. At the age of 8 or 9 years he was married to his wife, Musammat Sheorani Kunwar, who was about 3 years older. His "elders consented to this marriage from avaricious motives," and so he went to live thenceforward in his wife's father's house. Basti Ram, his father-in-law, died in 1860. In his later years he had lived a disreputable and extravagant life, and, as he neared his end, he was minded and entitled to make reasonable provision for his daughter out of family funds. The family wealth would pass to her brother, Suraj Parshad, and the family into which she had married, though "Kanaujia Brahmans of a superior grade," were poor. Suraj Kunwar testified that he recollected how Basti Ram, less than three months before he died, on the same day that he performed "*gausat-dan*" gave to Musammat Sheorani in his presence gold mohurs to the value of 10,000 rupees, saying to his wife, Musammat Babbo Kunwar, "You can purchase some village worth 10,000 rupees for our daughter." Suraj Kunwar was then a little over 13. He also called as a witness a friend, who, as a boy of 10, and an inmate of the household, remembered, or said that he remembered, this scene. What might well impress the husband of 13 was a more dubious matter in the recollection of his friend of 10.

Mouza Hansi Mau then belonged to one Ghasi Ram as his zamindari property. It was already in mortgage to Musammat Babbo Kunwar and two other ladies of the Tewari family, and 6,000 rupees out of the 10,000 rupees were invested upon a mortgage of it, partly by discharging the amount due on the old mortgage, partly by fresh advances. The new mortgages were dated in 1861 and 1862 and were in the names of Musammat Babbo Kunwar and her minor son, Suraj Parshad. The disappearance of the names of the other two ladies is used as an argument for saying that the transaction in question was not a joint family transaction. On the other hand, the fact that Musammat Babbo Kunwar was a party to these instruments as guardian of Suraj Parshad certainly points strongly the other way. Finally, on the 3rd August, 1863, the property was purchased, also in her name, for 7,660 rupees, the consideration being satisfied by discharging the principal and interest due on the prior mortgages. Musammat Babbo Kunwar's name, according to Suraj Kunwar, was inserted instead of her own at Musammat Sheorani's request. It was a *benami* transaction. Admittedly, until Musammat Babbo Kunwar died in 1890, ten years after her son, Suraj Parshad, the property was registered for Revenue purposes in her name, and only then was mutation into his own name applied for and obtained by Suraj Kunwar. He said that his wife, Musammat Sheorani, regularly received the income till she died, and that he continued to receive it from her death onwards.

If this story was accepted, the defendant had discharged the burden of proof, and had established that the transactions of 1860 to 1863 were *benami* transactions, to the benefit of which he was entitled. The answer to it was a point-blank denial. He was examined and cross-examined day after day at great length, and the trial Judge unhesitatingly believed him. On appeal his story was rejected as unworthy of belief, and judgment was entered for the plaintiffs. Hence the present appeal. The learned Judges of the High Court proceeded on the ground that the story was absurd, and that although, in spite of its inherent improbability, the trial Judge accepted it, this was only because he threw on the plaintiffs the burden of showing that Mouza Hansi Mau was not acquired *benami* for Musammat Sheorani. They held that such documentary corroboration as was produced was either unsatisfactory or corroborated the opposite case, and that the conduct and, apparently, the character of Suraj Kunwar were both suspicious and open to censure.

It is true that the learned trial Judge did say that the story was

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absurd, but the very sentence quoted by the Judges of the High Court shows his meaning, *viz*, "this story, with its bare nakedness and without any external support, seems improbable and absurd." It certainly was a story, which in itself alleged and involved the existence of corroborative material, and if that was not forthcoming, in so far as Suraj Kunwar could produce it, the story might well seem to be a hardy and palpable fabrication. Intrinsically, however, it was not inconsistent with human nature or the practice and sentiment of Hindoo families. It has commended itself, as such, to other Judges beside the learned Judge who tried the case. About 1900 those then acting in the present plaintiffs' interest quarrelled with Suraj Kunwar, and turned him bodily out of the family house, where he had lived, man and boy, for nearly fifty years. They then went to law with him. They sued him for possession of three mouzas, variously called Katharwa, Chhounki, and Kuihouli, and Kherwa, Jhunki, and Khijauli, which they alleged were the property of the Tewari family, and which he said were his own. In that suit he told the same story, and, although they then laid no claim to Mouza Hansi Mau, he made it an integral part of his case. On that occasion also the trial Judge believed him, and his judgment was affirmed on appeal. It was only after this failure that the plaintiffs brought the present suit for Hansi Mau.

As has been said, the Tewari family was rich. It owned a large zemindari ilaka. There was an old-established money-lending business. There were dealings in grain and in precious metals. The various transactions were recorded in minute detail in books of account as voluminous and complicated as the transactions themselves. Therein were to be found the various rents collected from ryots and the profits drawn from "sir" lands. Sums were entered ranging from hundreds of rupees to trivial amounts; there were entries of purchases of gold mohurs coined by many dynasties and of the expenditure of a few pence for sugar candy and a few pice for salt. The family had at least three shops, one at Pukhrayan and two in Cawnpore, the deorhi shop and the chouk shop. At Pukhrayan rents were collected, among others the rent of Hansi Mau. It was a subordinate establishment, and after deduction of its expenditure its takings were sent to one or other of the Cawnpore shops. With these books and these dealings the defendant was familiar. After Suraj Parshad came of age he employed Suraj Kunwar for some years as a karinda at Pukhrayan. When he died the family affairs passed into the hands of three purdahnashin ladies, Musammat Babbo Kunwar, his mother; Musammat Mithan Kunwar,

his widow, who lived till 1898; and Musammat Dilaso Bibi, wife of his son Sitla Parshad, who died a minor in 1887. With these ladies Suraj Kunwar, long regarded as one of the family, stood in high favour. He became their sarbarakhar, held their power of attorney, and no doubt had much influence with them and in the management of all the family affairs.

Insignificant though the income of Hansi Mau was as compared with the whole Tewari income, it is impossible that it should have found no place in the family books of account. It was collected by the Tewari karindas at Pukhrayan and entered in the books there under the name of the mouza. It was then remitted to Cawnpore. Somehow or other the Cawnpore books must have dealt with it also. If it belonged to the joint family it stood as a receipt in the Pukhrayan books, and the Pukhrayan shop had to discharge itself. In the Pukhrayan books, accordingly, there were entries showing the remittances sent to Cawnpore, either separately or aggregated with other cash. The Cawnpore books in turn must have shown whether it was separately paid away for or to the use of individuals, or was treated as an item in the general family cash and included in its totals. Somehow this income, like other remittances, had to be accounted for. It is true that the business seems to have been carried on unmethodically, and the books were neither regularly kept nor regularly balanced, but they served their turn, and must have been capable of throwing much contemporary light, one way or the other, on the truth of Suraj Kunwar's story about Hansi Mau.

For a long and important period the books were forthcoming. They were examined before the trial by a commissioner, who, it is to be hoped, understood his report better than anyone else has been able to do. Many bullock-loads of account books were in the Court compound at the trial, and at any rate a sufficiency of them were made available on the appeal. Selected entries were examined and explained in the evidence. Many, though not all, of them have been printed in the record. Some are clear and some are not. Assisted by copious and careful argument by counsel on both sides, their Lordships have done their best with them.

Unfortunately these books only begin about 1872. For the previous nine years they are not produced, and it was the plaintiffs' business to produce or account for them. When Suraj Kunwar ceased to be sarbarakhar and was turned out of the house, he left the family archives behind him. He says, though probably he exaggerates, that he was then too ill to walk unaided, and was not even allowed to take away his own papers. At any rate, at that

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time the plaintiffs, or those acting in their interest, must have come into possession of the business books of the Tewaris, whatever they were. An order for discovery was made upon the plaintiffs in this suit, but they produce none older than 1872. It may well be that the earlier books have been destroyed or have perished, but it was incumbent on the plaintiffs, and it would have been easy, to have given evidence of diligent search and of failure to find them, even if the fact and date of their destruction could not be proved. Such books must have existed, and must have been long preserved for business purposes. Nor is this matter one of mere mistake or oversight. In the earlier suit for possession of the three mouzas, the same course was taken by the plaintiffs, and the comments made on it by the Court were severe. On the repitition of it in the present suit, two consequences followed. Secondary evidence of their contents was let in, and such evidence Suraj Kunwar gave. He said that his wife, Musammat Sheorani, always had the Hansi Mau profits paid to her or paid away by her direction, and that she had an account which was kept in the books of the chouk shop at Cawnpore. Next the presumption arises that the contents of the Tewari family books, which were not accounted for, were, as regards the issues in dispute, unfavourable to the plaintiffs. That could only be because they favoured Suraj Kunwar and supported his story. So far there is ground for saying that the learned trial Judge was warranted in accepting his evidence. The High Court hardly seems to have appreciated this view of the matter.

The learned Judges seems to have thought that the question was, "Who made away with these books?" and that it was disposed of by acquitting the plaintiffs. To be sure, they say that they do not find Suraj Kunwar guilty, but as they add that he had the opportunity of getting rid of them if he chose to do so, they leave him under suspicion of misconduct entirely without evidence. Indeed, if Suraj Kunwar wished to suppress the facts and prepare the ground for an audacious fiction, he would not have spirited away the whole of the books before 1872 and spared all those of later date. He would have confined his attention to eliminating or improving the relatively scanty entries relating to Hansi Mau.

Their Lordships have carefully considered the portions of the books produced, to which their attention was directed, and they are of opinion that, so far as they go, they tend to support Suraj Kunwar's story. It would be an unprofitable task, as it certainly would be a tedious one, to set out the details of these accounts at length. There are a few entries in the books of the Pukhrayan shop showing

that the net proceeds of the Hansi Mau rents were taken to Cawnpore by Suraj Kunwar in the lifetime of Suraj Parshad. Suraj Kunwar said that they were his own moneys and were so treated by him, nor is there any entry produced from the Cawnpore books to show that on the contrary they were treated as part of the family funds. It is true that these entries by no means occur in every year, and that in the years in which they do not appear there is not, as might have been expected, credit of such sums to the personal account of Suraj Kunwar kept in the books of the Pukhrayan shop. It is noticeable also, and is unexplained, that in, at any rate, one instance a similar entry appears in connection with another mouza, mouza Umran, with which the defendant does not claim to have had anything to do. Still, unless Suraj Kunwar was merely the carrier of these moneys to Cawnpore, in which case the Cawnpore books must have credited them to Pukhrayan as remittances on the family account, these entries, such as they are, were an open assertion of right by Suraj Kunwar, which might naturally have been expected to have challenged enquiry and even litigation by Suraj Parshad. In the absence of any evidence of such challenge, these entries again tend to corroborate the defendant's story and are inconsistent with the plaintiffs' right.

Suraj Kunwar further produced, in support of his case, two sarkhats, one stating an account from 1864 to 1869, when Musammat Sheorani died, and the other, in continuation of it, running from 1869 to 1871. They purported to relate to the income of Hansi Mau on the credit side, and showed entries on the debit side of sums "sent to Katharwa," the village where the family of Suraj Kunwar lived; some purchases of jewellery, some losses in grain and cotton businesses, outlays for Musammat Sheorani's "dashah" ceremony, outlays on the occasion of her "barsi," and other sums. The judgment of the High Court disposes of these sarkhats as "most suspicious," apparently because they are not entries in a book but are written on separate sheets of paper, and says that they could easily have been fabricated. This may be so, but the uncontradicted evidence is that the first is wholly and the second partly in the handwriting of a man, who died in 1874, and, if he fabricated them with a view to their employment at a trial in 1909, Suraj Kunwar's case displays a foresight and care in its preparation which is remarkable even in Indian litigation. Again, the defendant explained these entries of moneys "sent to Katharwa" by saying that his wife setttled 5 bighas in Hansi Mau upon his family, which is not borne out by any document and is inconsistent with his having

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sold to his co-defendants the entire 12 annas share without reservation. Still their Lordships are not satisfied that these sarkhats, though they may deserve to be regarded with suspicion, ought to be disregarded altogether. So far as they go, though they are not very clear, they support the case of Suraj Kunwar, and are certainly inconsistent with that of the plaintiffs.

There were three occasions on which the conduct of those then entitled to the family property or employed in the family interest, was inconsistent with any knowledge or belief on their part that Hansi Mau could be claimed as family property, though, if it had been so treated since its acquisition, these persons could hardly have been ignorant of the fact.

When Suraj Parshad came of age he found that the mouzas belonging to the family stood in the names of his mother, Musammat Babbo Kunwar, and of two other ladies of the family. He claimed that he was entitled to mutation, sued to establish his right of succession and ownership under Hindoo law and succeeded. Though keenly alive to his rights he made no claim to Hansi Mau. His mother's name stood on the khewat of Hansi Mau as pattidar and lumbardar as long as he lived to the knowledge, at any rate, of his attorney, and so remained till she died long after him. Again, after those who represent the present plaintiffs had put the defendant out of the house, and certainly must have been minded to oust him from all property to which they conceived the family to be entitled, they brought the prior suit, already mentioned, to recover possession of three other mouzas, but made no claim to Hansi Mau, presumably because they then believed that they had no claim. Lastly, when Musammat Babbo Kunwar died, Suraj Kunwar claimed mutation of Mouza Hansi Mau into his own name. He supported this claim by producing a taliknama, executed by Musammat Mithan Kunwar and Musammat Dilaso Bibi, in which they set out in detail the story which he told at the trial of the present case, and on the strength of this obtained the desired mutation. This document was put in before the trial Judge. Their Lordships agree with the High Court in thinking that it was of little, if any, value; but one circumstance connected with it is somewhat significant. It was prepared with the knowledge of a certain Adhari Lal, a collateral member of the Tewari family, who in certain events would become personally interested in the family property, and had for some time been in the family employment as a karinda, and held, jointly with the defendant, the ladies' power of attorney. He took no exception either to the statements in or to the use of the taliknama.

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Their Lordships are fully alive to the fact that there was much to be said against the case which Suraj Kunwar made, and that persons in his position, who make such claims as he made, must expect their stories to be narrowly, and even sceptically, scrutinised ; but the question is not whether their Lordships would have believed his story, had they tried the case, but whether there is sufficient in the evidence to show that the High Court was right in holding that the trial Judge had misdirected himself as to the onus of proof, or had misjudged the weight of the evidence, or wrongly accredited certain of the witnesses called before him.

In the result their Lordships answer this question in the negative, and will, therefore, humbly advise His Majesty that the appeal should be allowed, with costs, and that the judgment appealed from should be set aside, with costs, and the decree of the trial Judge should be restored.

E. Dalgado :—Solicitor for the Appellants.

Barrow, Rogers and Nevill :—Solicitors for the Respondents.

J. M. P. *Appeal allowed.*

PRESENT :—*The Lord Chancellor (Lord Buckmaster), Lord Shaw, Lord Wrenbury, and Mr. Ameer Ali.*

T. S. MURUGESAM PILLAI

v.

MANICKAVASAKA DESIKA GNANA SAMBANDA PANDARA SANNADHI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

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1916.
November, 14, 16,

Mortgage—Mutt *property—Necessity—Evidence—Recognition of mortgage by successive heads of* Mutt—*Non-production of books of account.*

In a suit upon a mortgage granted over the property of a *mutt* by its head, the onus is upon the mortgagee or those in his right, to prove that the mortgage debt was incurred for a necessary expense of the *mutt.* When, however, many years have elapsed since the mortgage was executed, both lender and borrower being dead and succeeding heads of the *mutt* have recognised the mortgage debt as binding on the *mutt,* the Court should be more easily satisfied that the debt was properly incurred than where the mortgage is of more recent date, or where the transaction, though remote, has been the subject of challenge or dispute.

If the mortgagor withheld account books of the *mutt* which are in his possession and which would show the true nature of the debt, the Court is entitled to draw an inference in favour of the mortgagee.

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Appeal against a decree of the Madras High Court, 18th January, 1910, (White C. J. and Munro J.) reversing a decree of the Subordinate Judge of Mayavaram, dated the 6th November, 1907.

In 1881 Manickavasaka, the Pandara Sannadhi, as head of the Dharmapuram Mutt, gave plaintiff's father a promissory note for Rs. 14,000 "the sum received by us to-day in cash for the expenses of our Adhinam" (Mutt). In 1883 this promissory note was exchanged for a mortgage, and in 1888 Manickavasaka's successor in lieu of this mortgage executed another mortgage of the mutt property for Rs. 20,000.

The present suit was brought upon this last mortgage. The main defence was that the debt was not incurred for the purposes of the mutt. The Subordinate judge found that it was, and decreed the suit. He relied not so much upon the oral evidence as upon the documents, the conduct of the successive Pandaras, and the proved fact that at the time when the debt was incurred the mutt was embarrassed.

On appeal, the Madras High Court reversed this decision and dismissed the suit, holding that it was not proved that the debt was incurred for any purpose binding on the mutt.

The plaintiff-mortgagee thereupon appealed to His Majesty in Council.

Sir R. Finley K. C., *De Gruyther K. C.*, and *O'Gorman*, for the Appellant. The litigation for which the money was borrowed was for the benefit of the mutt. This appears from the report of the case of *Giyana Sambandha* v. *Kandasami* (1).

When the official in charge of a mutt mortgages the mutt's property there is a presumption that he is doing his duty. The mortgage was recognised by successive Pandaras, who paid interest on it from mutt funds. The books of the mutt would disprove our case if they showed that the mutt did not get the money, but they have not been produced : this justifies the inference that they do not assist the mortgagor. No doubt the burden of proof is on us to prove necessity, but after such a lapse of time and when necessity has never before been challanged very slight evidence should suffice to shift that burden.

Sir Erle Richards K. C., and *Kenworthy Brown*, for the Respondents, submitted that on the evidence the High Court had rightly held that it was not proved that the debt was incurred for the purposes of the mutt.

(1) (1886) I. L. R. 10 Mad. 375.

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The head of a mutt can only charge the mutt property for a real necessity; he has no greater powers than the manager for an infant heir: *Prosuno Kumari Debya* v. *Golab Chand* (1), *Abhiram Gossain* v. *Shyama Charan Nandi* (2). The burden of proving such necessity is on the mortgagee. The High Court have rightly held that in this case he has failed to discharge it.

No reply was called upon.

The judgment of their Lordships was delivered by

January, 23.

Lord Shaw:—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 18th January, 1910, which reversed a decree of the Court of the Subordinate Judge of Mayavaram, dated the 6th November, 1907.

The object of the suit is for the recovery of monies advanced under mortgage, and, in the event of default, for the sale of the hypothecated properties. The properties were those of the *mutt*, to be presently mentioned. The defence in substance is, that the loan over these properties, although granted by the head of the institution, was not granted in respect of any necessity of the *mutt* itself, which necessity falls to be proved.

The *Dharmapuram Adhinam*, or *mutt* is situated in the Madras Presidency. It is one of some importance, being a religious institution consisting of a group of religious houses, having various temples and other property, and endowments yielding a considerable revenue. The head of the institution is known as the *Pandara Sannadhi*. The transactions which form the subject of enquiry cover a period from about 1880 to the date of the suit, that is, a period of over a quarter of a century.

It appears to be established that in the year 1880-81 the *mutt* had just emerged from a heavy and expensive litigation, the costs in which amounted to about a lakh of rupees. The title of Manickavasaka, the then *Pandara*, who had in 1873 succeeded to the headship of the *Adhinam*, had been challenged, and the litigation, which lasted from 1875 to 1879, terminated in favour of Manickavasaka. In 1881, however, a fresh suit was instituted—this time by the *Pandara* himself—in order to establish certain rights in regard to religious houses alleged to be subordinate to the main *Adhinam* of Dharmapuram. This litigation is said to have cost about 80,000 rupees, and it was partially successful. The report of the case is contained in *Giyana Sambandha* v. *Kandasami* (3).

(1) (1875) L. R. 2 I. A. 145 (152); 14 B. L. R. 450.
(2) (1909) L. R. 36 I. A. 148; I. L. R. 36 Calc. 1003.
(3) (1886) I. L. R. 10 Mad. 375.

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There seems little reason to doubt that in this crisis in the affairs of the *Adhinam* the obtaining of an advance was important in the interests of the institution. Accordingly, on the 8th December, 1881, Manickavasaka granted a promissory note in favour of Sadaya Pillai, who is alleged by the respondents to have been the manager of the institution, but who appears only to have been the manager of one temple. The promissory note bears that "the sum received by us to-day in cash for the expenses of our *Adhinam* is 14,000 rupees."

Shortly thereafter Sadaya Pillai died, leaving a widow and three minor sons. On the 24th June, 1883, a hypothecation bond was executed by the same *Pandara*, namely Manickavasaka, in favour of Pillai's widow and children for the sum of 14,946 rupees, this sum being the 14,000 rupees contained in the promissory note with certain accumulated interest. The bond narrates that the original promissory note had been granted, and that the sum was paid "for the expenses of the aforesaid *Adhinam*." Various payments were made from time to time, of interest and towards the discharge of the debt.

Then in 1888 Manickavasaka died. So that it is fairly clear that, so far as his actings and writings are concerned, they confirm the constitution of the debt as one for the necessary expenses of the *Adhinam*.

Manickavasaka was succeeded by Sevagnana. He also recognised the binding nature of the mortgage. He made payments from time to time under the bond up to the year 1897. On the 4th November of that year he granted a fresh mortgage for 20,000 rupees. This is the mortgage sued upon. It is admitted that the 20,000 rupees is the balance due, as the mortgage itself expresses it, under the former bond of 1883 granted by Manickavasaka, Sevagnana's predecessor: and accordingly "the bond is granted, as was the former one, over the lands belonging to the *Adhinam*." This deed is the plainest ratification of the former transaction and of the fact that the advance had been made for the necessities of the *mutt* itself.

In the year 1903, Sevagnana vacated office, and it is true of him, as of his predecessor, that his conduct and deeds confirm the view that the debt bound the *mutt*.

The third *Pandara*, who is called Manickavasaka II, entered office in that year. In 1904 he made a payment of interest upon the mortgage. The validity thereof accordingly has been recognised by three generations, so to speak, of *Pandaras*.

Their Lordships have thought it right to give this narrative, because, in their opinion, the Court below has failed to attach to the transactions and actings set forth a sufficient importance.

The Board does not wish to cast any doubt upon the proposition that, in the case of mortgages granted over the security of an *Adhinam* or *Mutt* by the head thereof, it lies upon the mortgagee, or those in his right, to prove that the debt was a necessary expense of the institution itself. But it is a circumstance of great weight when holder after holder of the headship recognises and deals with the debt on that basis; and, as time goes on, this may itself come to be a not unimportant element of probation upon the issue. It must also be fully borne in mind that, with the lapse of time, the parties to the transaction may die or disappear. In the present case, Pillai, the lender, is dead; Manickavasaka, the borrower, is also dead; and it is conceivable that, as years elapse, in such cases nearly all the material evidence may in the course of years disappear, while the debt itself still remains, having from its initiation till almost the date of suit been recognised by all concerned as a debt truly constituted by the *Adhinam*. In such cases a Court is much more easily satisfied that the debt was properly incurred than where the transaction was itself recent, and can therefore be the subject of more exact evidence, or where the transaction, although remote, has been the subject of challenge or dispute by those charged with the interests of the institution.

The Board does not enter upon the oral evidence; having considered it, it sees no reason to disagree with the view thereof taken by the Subordinate Judge in the careful judgment which he has pronounced.

There is, it may be added, one element in the case to which their Lordships attach great weight. There is a certain body of evidence that the loan was made for the purposes of the *Mutt*; there is none to the contrary; but a more important question than even the balance of the oral evidence appears to be: What do the books of the *Mutt* disclose upon the subject? It is the habit of the heads or managers of these institutions to have books kept, and the entries are usually made in much detail and with much elaboration. They form a current record, on the financial side, of the history of the institution.

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard

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to third parties, this may be right enough : they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition. The present is a good instance of this bad practice. It is proved in the case by the first witness that "the *Mutt* has regular fair day-books; they are not now before the Court; ledgers are also maintained in the *Mutt.*" These ledgers and day-books were in the possession of the defendants or those of them who were heads of the institution, and they are not put in evidence. The proposition that these defendants challenged was that the expenses incurred had been incurred for the *Mutt* and were necessary for its purposes. The best assistance to a Court of justice would have been a scrutiny of these documents, and their Lordships feel free to conclude that if they had been by their entries confirmatory of the defendants' view the defendants would have brought them into Court. This part of the case, which in their Lordships' view is of considerable importance, is not referred to in the High Court.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside, and the decree of the Court of the Subordinate Judge restored. The respondents will pay the costs of the cause since the date of the Subordinate Judge's decree and also the costs of this appeal.

Douglas Grant :—Solicitor for the Appellants.

T. L. Wilson & Co. :—Solicitors for the Respondents.

J. M. P. *Appeal allowed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

THAKURDAS MOTI LAL

v.

JOSEPH ISKENDER AND OTHERS.*

CIVIL. 1917. *January, 3.*

Rateable distribution—Execution, application for, when to be made—Civil Procedure Code (Act V of 1908), Sec. 73, O. 21, R. 52—Anticipatory attachment—Attachment, effect of—Fund in Court attached by several creditors—Attaching creditors, rights of—Fund to be rateably distributed.

To attract the applicability of section 73 of the Code of Civil Procedure, it must be shown that the application for execution was made before the receipt of assets.

Under cl. (2) of the proviso to section 73, the point of time for consideration is the date of the sale of the property. Where none of the creditors had applied for execution prior to that date, section 73 has no application.

Rule 52 of order 21 does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is limited in its application only to money actually in his hands. What is attached must be something in existence and not merely in the future.

Attachment does not create any title in the attaching creditor; it creates no charge or lien upon the attached property; the attaching creditor does not acquire the status of a secured creditor. Attachment is effected by a Court for the benefit of the execution creditor by prevention of private alienation by the judgment-debtor of property out of which the creditor seeks relief.

Where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment; as the attachments create no charge or lien upon the fund, so long as the fund is in the custody of the Court, the Court is bound to apply the rules of justice, equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in *custodia legis* for the satisfaction of their dues. In such circumstances, the fund, if insufficient to meet in full the claims of the creditors, should be rateably distributed amongst them.

Appeal by the Opposite Party.

Application for execution of decree.

The material facts are stated in the following judgment of

Chaudhuri, J.—I think I must allow this application. The plaintiff obtained his decree on the 16th December 1915, against the defendant. Prior to that the property belonging to the 1916. *August, 31.*

* Appeal from Original Order No. 99 of 1916, against the order of Mr. Justice Chaudhuri, dated the 31st August, 1916, sitting on the Original Side.

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defendant was sold by the Registrar of this Court on the 11th December 1915, in a mortgage suit. On the 13th January 1916, the plaintiff obtained an order for attachment to the extent of Rs. 17,300. On the date of the sale Rs. 41,000 representing one-fourth of the value of the purchase money was paid into Court. Under the rules of this Court this amount was held by the Registrar, and the money was not transferred by him to the Accountant General, who is the same Officer. The balance of the purchase-money was paid on the 24th January, 1916. There was no other attachment prior to the 24th January 1916. On the 20th July 1916, the balance after satisfying the creditor in whose suit the property had been sold, was transferred to the credit of this suit. In the application for transfer, a statement was made that it was for purposes of rateable distribution under section 73. Certain creditors have now appeared who effected their attachments after the 24th January. Mr. Mitter appearing for the plaintiff argues that since his attachment was prior to the receipt of the assets and the other attachments are subsequent thereto, he alone is entitled to be paid and there ought be no rateable distribution until he has been satisfied. The other creditors contend firstly that the plaintiff's attachment was of money in the hands of the Accountant General, but as no money had come into his hands, that attachment is of no effect. It is said it was merely an attachment by way of anticipation, of funds likely to come into the hands of the Accountant General. I do not think that argument has much substance. What they intended to attach was the money which was then in Court, and in the hands of an officer of this Court. There was an undoubted right in the plaintiff to effect such an attachment but he made a mistake in mentioning the officer, due to the same officer being both the Registrar and the Accountant General. There was no confusion as to the money which was to be attached. That ground therefore fails. The next contention is that when the plaintiff applied for the transfer of the balance to his suit, he stated that it was for purposes of rateable distribution, and it is said that there should therefore be a rateable distribution. I do not think there is any substance in that also. There is no estoppel by statements of that character. The plaintiff is entitled to his legal right under section 73. I therefore make the order asked for. The balance after payment of the plaintiff would be rateably distributed as between the creditors who have attached, and the costs of their appearance today and of realisation would be added to the amounts claimed by them respectively. Certified for counsel.

The opposite party appealed against this order.

Messrs. N. Sarkar and *H. C. Mozoomdar* for the Appellants.

Messrs. S. R. Das and *B. L. Mitter* for the Respondents.

The judgments of the Court were as follows :

CIVIL. 1917. Thakurdas v. Joseph. *January, 3.*

Sanderson, C. J.—This is an appeal from a judgment of Mr. Justice Chaudhuri, whereby he granted the application of Joseph Iskender. That application was made asking for an order that the Comptroller General of Accounts for the time being of the Government of India and the Secretary and Treasurer for the time being of the Bank of Bengal with the privity of the Accountant General of this Court do out of the funds standing to the credit of this suit (No. 617 of 1915) viz. Rs. 29,894-5-11 pay to the plaintiff the sum of Rs. 16,519-7-0 being the decretal amount due to him under the decree made in this suit dated 16th December 1915 with interest.

One of the points which has been raised in the course of the argument is in my judgment of considerable importance, and in order that it may be correctly appreciated, it is necessary to look at the facts carefully and in some detail.

The facts, as stated by the learned Counsel for the appellant, Mr. Sarkar, in opening the appeal and which, it is agreed, are, not disputed are as follows: It appears that on the 14th of August 1915, the appellants, Thakurdas Motilal, the names under which they carry on business, obtained a decree for Rs. 14,842-12-6 against one Kally Churn Sett. At sometime or other the date of which is not material—a decree was made in a mortgage suit against the said Kally Churn Sett, and certain property which was comprised in the mortgage was on the 11th of December 1915 sold for the sum of Rs. 1,63,500. The sum of Rs. 41,000 was paid on the day of the purchase by the purchaser, as a deposit made to the Registrar of the Original Side of the High Court. On the 16th of December 1915, the respondent in this appeal, Joseph Iskender, obtained a money-decree for Rs. 16,519-7-0, against the said Kally Churn Sett. On the 13th of January, 1916, the respondent Joseph Iskender obtained an order for attachment of moneys to the extent of Rs. 17,300 out of the above-mentioned purchase money of Rs. 1,63,500. The application upon which that order was made was as follows " I pray that the total amount of Rs. 16,519-7-0 together with interest on the principal sum up to date of payment and the costs of the suit and the costs of taking out execution be realized by attachment to the extent of Rs. 17,300 in the hands of the Accountant General of this Honourable Court payable to the defendant out of a sum of

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Rs. 163,500 representing the sale proceeds of the defendant's immovable properties sold by the Registrar of this Honourable Court on the 11th December last in execution of decrees, dated respectively 17th February, 1911 and 1st March 1912, made in suit No. 1144 of 1910 of this Court (*Raja Sreenath Roy* v. *The Defendant in this suit*) and the amount be paid to me." The order which was made upon that application by the Registrar on behalf of the Court was in these terms, and it was addressed to the Accountant General of the High Court, Original Side. "Sir,—The plaintiff having applied under Order XXI, Rule 52 of the Code of Civil Procedure for an attachment of the money now in your hands to the extent of Rs. 17,300 payable for the defendant out of a sum of Rs. 163,500 representing the sale proceeds of the defendant's immovable property sold by the Registrar of this Court on the 11th December, 1915, in execution of decrees, dated respectively the 17th February, 1911 and 1st March, 1912, made in suit No. 1144 of 1910 of this Court (*Raja Sreenath Roy* v. *The Defendant in this suit*). I am directed to request that you will withhold the said money subject to the further order of this Court.—Sd. J H. Hechle, Registrar."

Now, it is to be noticed that at that time there was no money in the hands of the Accountant General in respect of this matter. The sum of Rs. 41,000 which was paid as a deposit was in the hands of Mr. Hechle in the capacity of the Registrar of the High Court, and it was not until the 24th of January, 1916, that the purchaser upon an order of the Court paid in the balance into Court. On the 26th of January, two days after the money was paid in, the appellant applied for attachment of the sale proceeds. On the 11th of February, Chuni Lal Johurry, another creditor, made a similar application for attachment of the sale proceeds. On the 15th of February, 1916, the appellant obtained an order for attachment, and that attachment was effected, as I assume, in a manner similar to that in which the attachment of the respondent was effected on the 13th of January, 1916. Then comes an important date: It appears that on the 16th of February, 1916, the money was transferred by the Registrar to the Comptroller General of Accounts with the privity of the Accountant General. On the 29th of February the other creditor, Chuni Lall Johurry obtained an order for the attachment of the sale proceeds in execution of his decree. On the 15th of March, there was an order that the mortgagee should be entitled to take out of Court, a sufficient sum in satisfaction of his claim in respect of the mortgage decree, leaving a balance of Rs. 29,894 in Court, to the credit of the mortgage suit. On the 20th

of July, 1916, an order was obtained, as we are informed, *ex parte* by the respondent Joseph Iskender that this balance of Rs. 29894, should be transferred from the mortgage suit to the suit in which the respondent was the plaintiff and Kally Churn Sett was the defendant. That application was based upon the allegation that the respondent had obtained an order for attachment of the balance of the purchase money, and it was also upon the basis that the application was made for the purpose of having the sum transferred in order that it might be rateably distributed amongst the creditors of the defendant Kally Churn Sett. These are all the dates and facts which I think it necessary for me to mention for the purpose of my judgment. Then the application in this case was made on the 26th August, 1916. I have already referred to the application and I need not mention the terms again. Upon that application the learned Judge made an order that the respondent should be paid out of the balance the sum which he asks.

It is against that order that this appeal is brought: and, the first point that was argued by the learned Counsel for the appellant was that this application was one which was under Order XXI, rule 52 of the Code of Civil Procedure. I do not think myself that there is any doubt that that was so, having regard to the documents which have been put before us. That rule is as follows:—"Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued." Then there is a form in the Appendix (No. 21 of Appendix E) which was followed in this case in the order which I have read, dated the 13th of January, 1916.

The learned Counsel for the appellant argued that inasmuch as this was an order directed to the Accountant General of the High Court and inasmuch as at that time there was no money in the hands of the Accountant General, the attachment was invalid. In my judgment that argument must prevail.

It was urged on the other hand that Mr. Hechle occupied the position of the Registrar and also that of the Accountant General and that there was no doubt as to the identity of the fund which was in question and that the intention was that the respondent was asking for an order to attach the balance which might remain over, after the mortgage was paid out. That might be so. It is quite true that there was no doubt about the identity of the fund, as

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there was no doubt as to what was the object of the respondent. But we have got to follow the words of the statute which are in my opinion quite clear and which have been also interpreted by the decision of the High Court. I think that when the Rule says that "where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer," it is clear that that Rule was only intended to relate to an officer who has, at the time the application is made, in his hands the fund which may be the subject of attachment. My interpretation of the Rule is borne out by the judgment of this Court to which my learned brotner Mr. Justice Mookerjee was a party, in the case of *Raja Padmanand Singh* v. *Ramprosad Malvi* (1). The passage in his judgment to which I desire to refer is at page 19 and is as follows : "In so far as Rule 52 of Order XXI is concerned, the case is equally clear. As already stated, that rule applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, and is restricted only to money actually in his hands." Those are words which in my judgment are strictly applicable to this case, and are words with which I entirely agree : and, I think that is sufficient for the judgment at which I have arrived namely that the attachment which was attempted to be made by the respondent on the 13th of January, 1916, was an invalid attachment.

The result of that conclusion is that not only was the attachment of the respondent an invalid one, but also the attachment effected by the appellant on the 15th of February 1916 was invalid, because it was exactly in the same form as the attachment of the respondent. At that time, there were no funds in the hands of the Accountant General: and, therefore, the result is that the attachment of the respondent and the attachment of the appellant were both equally invalid.

Then it was argued by Mr. Das on behalf of the respondent that even if that were so, and even if the attachment which was effected by his client was invalid, still there was this sum standing to the credit of the suit in which his client was the plaintiff and he had made an application to have so much as would satisfy his claim paid out of that sum, and that inasmuch as the creditor whose attachment was valid, namely, Chuni Lall Johurry had not made any objection, and inasmuch as the attachment effected by Mr. Sarkar's client was invalid he was entitled to have the money paid out of

(1) (1911) 16 C. W. N. 14.

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that sum. With that argument I cannot agree for this simple reason: To my mind it is obvious that that application was based upon the original application for execution; it was clearly, having regard to the wording of the petition made in continuation of his application for execution; and, inasmuch as I have already come to the conclusion that the attachment was an invalid attachment. I do not think that that application for the payment out of the money in question was one which could have been acceded to by the Court, quite apart from the fact that the order for the transfer of the money had been obtained *ex parte*, upon a representation that it was for the purpose of distributing the money rateably amongst the creditors. The position therefore is this: Both the attachment effected by the respondent and the attachment effected by the appellant were invalid: and it appears that the attachment effected by Chuni Lall Johurry which was made after the money had reached the hands of the Accountant General was a valid attachment. I now have to consider what are the rights of Chuni Lall Johurry, on the one hand and the appellant and the respondent on the other hand, because on this part of the case the appellant and the respondent are in the same position. It appears from the enquiries which have been made during the course of the argument, that there are no other creditors who attached or attempted to attach this fund.

Now, the learned Counsel for the respondent, Mr. Das, and the learned Counsel for the appellant Mr. Sarkar, have both applied to us today that we should allow them to make an application for attachment of the fund. To this application, in my judgment, we ought to accede, not only because we think that otherwise a great deal of unnecessary expense would be incurred but also because we think that right and justice necessitate that we should accede to that application. Therefore, I will consider this further question from the point of view of there being an attachment effected not only on behalf of Chuni Lall Johurry on the 29th of February 1916, but also there being an attachment on behalf of the respondent and an attachment on behalf of the appellant both of which become effective on the 3rd of January 1917, today, simultaneously and contemporaneously. This is a point which in my judgment is of considerable importance.

The learned Counsel for Chuni Lall Johurry has argued that inasmuch as his client's attachment was antecedent in point of date to the attachment effected by the respondent and the attachment effected by the appellant, his client ought to be allowed to take, out of the money which is in Court, the whole amount of his client's

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debt: and, that after his debt has been satisfied to the full extent he does not mind how the fund is to be treated whether rateably or not. I have come to the conclusion that that argument ought not to be acceded to. The conclusion depends upon what is the effect and meaning of such an attachment as has occurred in this case: Does it on the one hand give to the creditor who has attached the money, any interest in the fund, or is it merely an order restraining alienation of the fund until further order of the Court? In my judgment it means the latter: and, I think that has been decided not only by authority of this Court but also by authority of the Privy Council. I desire only to refer to three cases the first of which is the case of *Shoobal Chunder Law* v. *Russick Lall Mitter* (1). Another case which was decided by a Full Bench of this Court, is the case of *Frederick Peacock* v. *Madan Gopal* (2) and, the third is a Privy Council decision, *Raghunath Das* v. *Sunder Das Khetri* (3):—the result of all those decisions is that such attachment as has occurred in this case is merely to prevent alienanation of the fund subject to the further order of the Court, and does not give title to the creditor who effected the attachment. That being so, when it is found that subsequently two other creditors have obtained attachment of the same fund, what is the further order of the Court that is to be made? Having regard to the scheme of the code, I think that the order ought to be that those creditors ought to share rateably with regard to the amounts which are due to them respectively.

For these reasons I think that this appeal must be allowed, and the order will be drawn up as I have stated. I think it would be desirable that the order before it is finally settled, should be submitted to the learned Counsel appearing on both sides, and if necessary they will have liberty to apply. The applications on behalf of the respondent and of the appellant in respect of the attachment and payment out, must be put in writing before half past four today, as stated by the learned Counsel, and those applications when put in will be granted and our order will be that this fund must be distributed amongst the three creditors reteably with regard to their respective debts. For this purpose it is agreed by the parties that the money in Court will be paid out to Messrs. Morgan & Co., who will distribute the whole amount,—the money which is already in their hands and the money so paid out of Court, amongst the three creditors in accordance with our judgment, less poundage.

(1) (1888) I. L. R. 15 Calc. 202. (2) (1902) I. L. R. 29 Calc. 428.
(3) (1914) I. L. R. 42 Calc. 72; 20 C. L. J. 555.

With regard to costs, we think that the appellant has succeeded materially upon this appeal, and has in fact got the judgment of Mr. Justice Chaudhuri set aside. We direct that Mr. Das's client do pay the costs of Mr. Sarkar's client in this appeal, and that Chuni Lal Johurry do pay his own costs in this appeal, and that as regards the costs in the Court of first instance each party do pay his own costs.

Mookerjee, J.—The facts material for the determination of the question in controversy may be briefly stated. In execution of a mortgage-decree obtained by Sreenath Ray against Kally Charan Sett, the hypothecated properties were sold on the 11th December 1915 for Rs. 1,63,500. The purchaser, on that date, brought into Court Rs. 41,000; the balance was deposited on the 24th January, 1916. The decree-holder was paid his dues and the surplus Rs. 29,894, was on the 16th February, transferred by the Registrar to the Accountant General. Kally Charan Sett, it appears, had a number of unsecured creditors of whom three are now before this Court—one as appellant, the other two as respondents. Of these three, Thakurdas Motilal held a decree for money, dated the 14th August, 1915. On the 26th January 1916, he applied to execute his decree and obtained an order for attachment on the 15th February following. Chuni Lal Johurry had obtained a decree for money on the 24th August, 1915. He applied for execution on the 11th February 1916, and the attachment at his instance was effected on the 29th February, 1916. Joseph Iskendar obtained his decree on the 16th December, 1915. His application for execution was presented and the attachment at his instance effected on the 13th January, 1916. The Court is now invited to decide the relative rights of these three creditors in respect of the surplus fund in Court.

It is plain that no question of rateable distribution under section 73 of the Code of Civil Procedure of 1908, arises as amongst these creditors. Section 73 (1) provides that "where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons." If this sub-section were held applicable it would have to be shown that the applications for execution had been made before the receipt of assets. In the case before us, this condition is not fulfilled, as the assets must be deemed to have been received on the 24th January, 1916: *Maharaja of Burdwan*

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v. *Apurba Krishna Roy* (1). On the other hand, under clause (*c*) of the proviso to section 73, which is applicable to this case, it is plain that the point of time for consideration is the date of the sale of the property. Here the sale took place on the 11th December, 1915; and as none of the creditors had applied for execution prior to that date section 73 has no application, as was erroneously assumed by one or other of the parties at an earlier stage of the proceedings. The real question then reduces to this, was there a valid attachment effected of this fund by any of the three creditors? There is no room for controversy that the attachment effected at the instance of Chuni Lal Johurry on the 29th February 1916, was valid and operative in law. But as regards the attachment alleged to have been effected by Thakurdas Motilal and Joseph Iskendar, the question arises, whether steps were taken by them in conformity with Rule 52 of Order 21 of the Code. Now, that Rule provides that "where the property to be attached is in the custody of any Court or public officer the attachment shall be made by a notice to such Court or officer, requesting that such property and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued." In the case before us, the attachments were effected by both these creditors on the assumption that there was a fund in the hands of the Accountant General of this Court. But on the dates when the attachments were effected, there was no such fund in the hands of the Accountant General. Consequently neither of the attachments would be valid and operative, unless it was held that the rule allows of an anticipatory attachment of money expected to reach the hands of a public officer. A reference to the terms of Form 21 of Appendix E to the Code, however, makes it manifest that the Rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is limited in its applieation only to money actually in his hands. This was the view adopted by this Court in the case of *Raja Padmanand Singh* v. *Ramprosad Malvi* (2), where the Court followed the earlier decision of the Bombay High Court in *Tulaji* v. *Balabhai* (3). The principle of the rule, as concisely stated by Mr. Justice Beaman in *Umabai* v. *Amritrao Anant* (4), is that what is attached must he something in existence and not merely in the future. The same view has been recently adopted by the Madras

(1) (1911) 14 C. L. J. 50.
(2) (1911) 16 C. W. N. 14. (3) (1896) I. L. R. 22 Bom. 39.
(4) (1914) I. L. R. 39 Bom. 80 (85).

High Court in *Tiruvangadial* v. *Thiruvangadiah* (1). There is consequently no escape from the conclusion that the attachments on the basis whereof Thakurdas Motilal and Joseph Iskendar seek relief are not operative in law.

The question finally arises, what is the relative situation of the three creditors. Thakurdas Motilal and Joseph Iskendar have now prayed for the immediate attachment of the fund in Court and that application we have decided to grant. Consequently the position at the present moment is that there is an attachment effected by Chuni Lal Johurry on the 29th February 1916, as also two other attachments effected at the instance of Thakurdas Motilal and Joseph Iskandar on the 3rd January, 1917. As between these two attaching creditors no question of priority can arise; but the question remains, whether Chuni Lal Johurry is entitled to precedence by reason of the priority of his attachment. He claims such priority and relies upon the decision in *K. Tiruvangadial* v. *Thiruvangadiah* (1) which does support his contention. The contrary view, however, has been taken by the Madras High Court itself in *Suikeena Katum Sahiba* v. *Hajee Mahomed Abdul* (2). We are in this Court free to decide the question on first principle, and when the matter is so regarded, it seems fairly clear that no question of priority can arise on the basis of the successive attachments. As was pointed out by the Judicial Committee in *Moti Lal* v. *Karrabuldin* (3) and *Raghunath Das* v. *Sundar Das Khetri* (4), attachment does not create any title in the attaching creditor; it creates no charge or lien upon the attached property; the attaching creditor does not acquire the status of a secured creditor. Attachment is effected by a Court for the benefit of the execution creditor by prevention of private alienation by the judgment-debtor of property out of which the creditor seeks relief. This view was adopted by this Court in the cases of *Soobul Chunder Law* v. *Russik Lall Mitter* (5) and *Peacock* v. *Madan Gopal* (6). Consequently we must apply the principle that where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching-creditors is entitled to preferential treatment by reason of the priority of his attachment; as the attachments create no charge or lien upon the fund, it is obvious that so long as

(1) (1913) 26 M. L. J. 364.
(2) (1913) I. L. R. 38 Mad. 221.
(3) (1897) I. L. R. 25 Calc. 179; L. R. 24 I. A. 170.
(4) (1914) I. L. R. 42 Calc. 72; L. R. 41 I. A. 251; 20 C. L. J. 555.
(5) (1888) I. L. R. 15 Calc. 202. (6) (1902) I. L. R. 29 Calc. 428.

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the fund is in the custody of the Court, the Court is bound to apply the rules of justice, equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in *custodia legis* for the satisfaction of their dues. In such circumstances, the fund, if insufficient to meet in full the claims of the creditors, should be rateably distributed amongst them. On these grounds, I hold that the order now under appeal cannot be supported and must be set aside.

Messrs. O. C. Ganguly & Co.—Attorneys for the Appellant.

Messrs. Morgan & Co, Dey and Kshetrya, and B. N. Bosu & Co.—Attorneys for the Respondents.

A. T. M. *Appeal allowed.*

CRIMINAL REVISION.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr. Justice Walmsley.

CRIMINAL.

1916.

July, 21.

BALAILAL MOOKERJEE

v.

PASUPATI CHATTERJEE.*

Criminal Procedure Code (Act V of 1898) S. 202—Complaint—Investigation by a police-officer—Reasons, to be recorded—Process, issue of—Accused, if can appear before the Magistrate before issue of process.

Under section 202 of the Code of Criminal Procedure if the Magistrate distrusts the statement of the complainant he must record his reasons for his not being satisfied as to the truth of the complaint, before conducting an inquiry himself or directing a local investigation as provided in the section.

Baidya Nath Singh v. Muspratt and others (1) followed.

Before process has been issued by a Magistrate an accused person should not be allowed to be represented by a pleader and to address the Magistrate to argue the points which may arise in the case and to put in a detailed statement of the points and the facts upon which the defence relies.

Criminal Revision.

The complainant Balailal Mookerjee made a complaint against the accused Pasupati Chatterjee in the Court of the Chief Presidency

* Criminal Revision No. 660 of 1916, against the order of D. Swinhoe Esq., Chief Presidency Magistrate, Calcutta, dated the 3rd March, 1916.

(1) (1886) I. L. R. 14 Calc. 141.

CRIMINAL.

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Balailal v. Pasupati.

Magistrate, Calcutta, under sections 381, 408 and 403 of the Indian Penal Code. The learned Magistrate after examining the complainant directed an inquiry into the matter by a police-officer. Upon a report having been submitted by the police-officer, the Magistrate again examined the complainant, and read the documents etc. filed by both the parties, and allowed the accused to be represented by a pleader. The Magistrate then hearing the arguments adduced by both the sides dismissed the complainant's application under section 203 of the Code of Criminal Procedure.

Against that order the complainant moved the High Court and obtained the Rule.

Mr. Norton and *Babu Narendra Kumar Bose* for the Petitioner.

Mr. C. R. Das and *Babus Manmatha Nath Mukherjee* and *Probodh Chandra Chatterjee* for the Opposite Party.

The following judgments were delivered :

July, 21.

Sanderson, C. J.—This was a Rule which was granted to show cause why the order of the Magistrate by which he dismissed the complaint should not be set aside.

The grounds upon which the rule has been supported are two : *first*, that the procedure which is laid down by the Code of Criminal Procedure has not been followed by the learned Magistrate ; and, *secondly*, that if the procedure had been followed by the Magistrate, and if he had confined himself to the materials which he would have had before him if such procedure had been followed, then upon such materials he ought to have issued process.

With regard to the first point, we are both of opinion that the procedure laid down by the Criminal Procedure Code has not been followed in two material respects, and we wish to say that we think it is most desirable that Magistrates should follow the procedure which is quite clearly laid down in Chapter XVI dealing with 'complaints to Magistrates'—It is not necessary for me to recapitulate here what is laid down as plainly as it could possibly be, in sections 200, 201, 202, and 203. The first irregularity was that the Magistrate directed an investigation to be made by a police-officer, without having recorded his reasons for his not being satisfied as to the truth of the complaint. Section 202 says, that if the Magistrate "is not satisfied as to the truth of a complaint of an offence of which he is authorised to take cognizance, he may, when the complainant has been examined, record his reasons, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a

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previous local investigation to be made by any officer subordinate to such Magistrate, or by a police-officer ....."

It is not necessary for me to dwell at any length upon this matter, because so long ago as 1886 this matter was dealt with by this Court in the case of *Baidya Nath Singh* v. *Muspratt and others* (1), where the learned Judges said, "It is clear to us that under section 202 if he distrusts the statement of the complainant *he must record his reasons.* In any case he is bound to record his reasons for distrusting the complaint. That appears to us to be quite reasonable." I not only follow that ruling, but I think it is a perfectly right and reasonable ruling, and I do not see any reason why Magistrates should not follow that which is laid down by the statute and by the decisions of this Court.

The second irregularity which is relied upon was that the learned Magistrate did not confine himself to the evidence of the complainant and the report which was made by the police-officer, but that he allowed the accused to be represented by a learned pleader and to address him to argue the points which arose in the case and to put in a detailed statement of the points and the facts upon which the defence relied.

To my mind, this procedure is quite inconsistent with the scheme of this Legislation ; I do not understand how the accused person ever goes before the Magistrate until the Magistrate has made up his mind to issue process. The Magistrate is directed by the statute to enquire into the case in certain specified ways, and then having investigated the matter in one or other of the specified ways, he is to decide whether process ought to issue, and then if he thinks that process ought to issue he should direct process to issue. Then the accused person appears, and if he has got a defence, his defence is investigated as well as the case for the prosecution. That being so, it appears to me that the learned Magistrate has not acted in this case in accordance with the procedure which is laid down by the Criminal Procedure Code.

Then arises the second point: The learned Counsel appearing to show cause against this rule has argued that possibly even if we think that the Magistrate has not followed out the procedure laid down in the statute, we ought not to make this Rule absolute because it is a matter of discretion whether we should make the Rule absolute— as to which he is perfectly right; it is entirely in our discretion whether we should make the Rule absolute and because it is obvious, as he argues, that even if the learned Magistrate had

(1) (1886) I. L. R. 14 Calc. 141.

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confined himself to the materials which he might legitimately consider, the conclusion at which he had arrived, namely, the dismissal of the complaint was a right one. We have given full consideration to that argument, but we cannot accede to it, and we think that this matter must go back to a magistrate to investigate in the ordinary way. Inasmuch as it is going back to the Magistrate, it is advisable for us to say as little as possible upon this second point, because if we were to embark upon the matter we might say something which might affect the Magistrate's mind and might prejudice either the one side or the other. I only say this, that broadly speaking, the case which was made by the complainant—I am not saying whether it is true or whether it is untrue and I desire again to guard myself by saying that whatever I say ought not to prejudice either side in any way—the complaint was that as soon as the owner of this business died, the accused person who was the manager took into his possession all that represented that business. He changed the place of business, and as I have said before took into his possession.—I advisedly refrain from using the word "convert," all that represented that business and then apparently entered into negotiation with the sons of the deceased person, proposing that they should enter into partnership of the new business which he intended to start giving them four annas share in the business. The Police-officer investigated this matter, set out the facts in a full and careful report, and finished his report by saying that this was all a question of the intention of the accused or, words to that effect, and I say that this is in all probability one of the main questions which the Magistrate will have to investigate in this case. We have not the evidence of the complainant before us and upon the materials that we have we are unable to say that it is so absolutely clear that there was no such intention, that in the exercise of our discretion we ought to refuse to make the Rule absolute.

For these reasons we think that the Rule should be made absolute and the matter should be investigated further. But inasmuch as Mr. Swinhoe has already passed an opinion about it, he will not hear this case again. Therefore we will ask him to refer the case to either the second or the third Presidency Magistrate. The Magistrate should investigate the complaint in the ordinary way and come to his own conclusion upon it.

Walmsley, J.—I agree.

A. N. R. C. *Rule made absolute.*

Before Mr. Justice Chaudhuri and Mr. Justice Newbould.

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September, 22. October, 18.

MAHAMMAD HOSEIN

v.

A. W. FARBY AND ANOTHER. *

Trespass—Indian Railways Act (IX of 1890), Secs. 68, 69, 122—Travelling without pass or ticket in a railway, if criminal—Railway servants—High Court, if can review judgment—Application for enhancement of sentence.

There is no provision in the Railways Act for ejecting passengers except in certain circumstances such for instances as are specified in section 120. Section 122 of the Railways Act is not applicable.

The term 'Railway' in section 122 of the Railways Act, excludes a Railway carriage. The term "Rolling stock" includes it.

Travelling in a railway carriage without a pass or ticket, but without intent to defraud, is not a criminal offence.

The main and primary purpose of sections 68 and 69 of the Railways Act, is to prevent persons from travelling in fraud of the Company without having paid the necessary fare, and that the obligation to show the ticket, when required, is subsidiary only to such primary purpose.

Railway servants are public servants.

There is no common law right to inflict blows on a man with fists if he refuses to move.

The High Court has no power to review the judgment passed on a reference under section 438 of the Code of Criminal Procedure. If the record is not sent down, it could make a recommendation to the Government if it were found that it erred in its decision.

An applicaiion for enhancement of sentence is not ordinarily entertained by the High Court on behalf of private parties. Such applications are not entertained in a reference under section 438 of the Code of Criminal Procedure but should be made in the usual way.

Reference under section 438 of the Code of Criminal Procedure.

The material facts and arguments appear from the judgment.

The judgment of the Court was as follows :

September, 22.

We think the Magistrate was right in convicting the accused under section 323 Indian Penal Code.

There is no provision in the Railways Act for ejecting passengers except in certain circumstances such for instances as are specified in section 120. Section 122 of the Railways Act of 1890 is not applicable to this case. The term "Railway" as defined in section 2 clause (4) excludes a railway carriage. The term "Rolling stock"

* Criminal Revision No. 157 of 1916 and Criminal Reference by S. P. Baksi Esq., Sessions Judge of Noakhali, dated the 5th September, 1916, recommending quashing of the sentence passed by Mr. P. Sen, Sub-divisional officer of Noakhali, dated the 17th August, 1916.

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as defined in section 2, clause (10) includes it. There is no provision corresponding to section 2, sub-clause 10 in the old Acts of 1854 and 1879. Section 68 prohibits travelling without a pass or ticket, but so to travel without intent to defraud is not a criminal offence. Here there is a distinct finding that there was no fraudulent intent. Section 113 provides that a person so travelling shall be liable to pay on demand any Railway servant an excess charge. This section corresponds to sections 31 and 32 of Act IV of 1879. It is to be noticed that there was no provision in the Act of 1879 for payment of an excess charge, which is somewhat in the nature of a penalty. Taking that provision in connection with the fact that travelling in a Railway carriage without a ticket, but without fraudulent intent, has not been made punishable, we think that the Magistrate has taken an entirely correct view of the law. *Protap Daji's case* (1) was a civil case which arose out of a claim for damages for wrongful detention and removal of a passenger. It was decided under the old Act, which has since been amended and altered. The expression "Railway" in section 122 as already stated does not include a railway carriage. In addition to the definitions, a comparison of section 120 and section 122 leads to the same conclusion. Railway servants are public servants. They are to act within the four corners of their statutory powers. It was held in *Butler* v. *Manchester Shefield and Linconshire Railway Co.* (2), by Lord Esher M. R. that no one had any right to lay hands forcibly on a passenger in the absence of some legal authority to do so. Lindley L. J. and Lopes L. J. agree in that view and held that the Company's servants were not justified in the absence of any by-law or regulation in laying hands on a passenger.

The main and primary purpose of sections 68 and 69 of the Indian Railways Act is to prevent persons from travelling in fraud of the Company without having paid the necessary fare, and that the obligation to show the ticket, when required, is subsidiary only to such primary purpose. Travelling without a ticket is not a criminal offence, as has been repeatedly held in this Court. It is the frequent practice of ticket-checker to take money and issue tickets to passengers, who may have got into a train in a hurry without tickets, as appears from the evidence. In this case the complainant was perfectly willing and offered to pay the fare together with any excess that might be chargeable. Under the circumstances it would be absurd to hold that the ticket-checkers concerned, were legally justified in committing the acts charged

(1) (1875) I. L. R. 1 Bom. 52. (2) (1888) L. R. 21 Q. B. D. 207.

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against them. The least that can be said about the acts complained of, is that they were extremely high-handed. The complaint was that the accused had abused the complainant and got him out by force and kicked him and given him a beating, that he was kept confined the whole night and was released the next day. The learned Magistrate has found the two accused guilty under section 323 Indian Penal Code and gave them the benefit of the doubt as regards the charge under section 342. The learned Magistrate has also found that the injuries on the person of the complainant were caused by voluntary blows and that those blows were given by the accused with their fists. It is clear therefore that the accused used more force than was necessary for the purpose of removal. The learned Sessions Judge says that although it is not a case of trespass as defined in the Penal Code, it is at least a civil trespass, and that the owners are entitled to use their common law rights. This is due to his having overlooked the position of a Railway company and its servants. He has overlooked the fact that they as such cannot in a case like this claim common law rights. Where is there again a common law right to inflict blows on a man with fists if he refuses to move?

Ticket collectors and checkers are expected to conduct themselves with restraint and self-control. We are disposed to think that they have been leniently dealt with in this case, and refuse the reference. The judgment of the Magistrate, we may add, is characterised by great ability and care.

[Subsequently the accused prayed to be heard, when the Court passed the following order :]

September, 25.

Let the sending down of the order in this case be stayed for the present until the petitioner is heard; and let the case be placed on the board on the day the Court reopens after the close holidays. In the meantime, let the petitioner be permitted to file a *vakalutnama*. We are allowing this as there was a mistake *bona fide* made by the learned vakil for the accused and the case is one of importance.

Babus Manmatha Nath Mukerjee and *Probhat Chunder Dutt* for the Accused.

Babu Bhagirath Chunder Das for the Complainant.

The judgment of the Court was as follows :

October, 18.

After we had signed the judgment, an application was made to us on behalf of the vakil for the accused that he had been misled

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and could not appear in time to file his *vakalatnama*. We therefore directed this matter to be placed on the list to give an opportunity to the learned vakil on behalf of the accused to make his submissions. We doubt as to whether we can review a judgment which has already been passed and signed; but, inasmuch as the judgment had not been sent down, we felt that, if sufficient cause was shown, we might possibly make a recommendation to the government that is to say if we found that we had erred in our decision. We have now heard the learned pleader and do not see any reason why we should alter our decision. All the points now raised have been carefully considered by us and the learned vakil, after reading our decision, does not think that he would be justified in asking us to review the judgment which has been passed.

An application was made by the learned vakil for the complainant for enhancement of the sentence. We cannot entertain that application on this reference. An application of that character ought to be made, if considered necessary in the usual way, such applications are not ordinarily entertained on behalf of private parties.

A. T. M. *Reference refused: Rule discharged: Complainant's petition refused.*

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

KAILAS CHANDRA DATTA AND OTHERS

v.

PADMAKISOR RAY AND OTHERS.*

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1917.

March, 20. April, 23.

Second appeal—Question of fact—Custom not established by evidence.

The question whether a given state of facts establishes a binding custom or usage, is a question of law, but the question whether such a state of facts has been proved by the evidence is a question of fact.

* Letters Patent Appeals Nos. 100 and 101 of 1914, against the decisions of Mr. Justice D. Chatterjee, dated the 17th July, 1914, in Appeals from Appellate Decrees Nos. 4155 and 4156 of 1910, against the decrees of Babu Saroda Prosad Sen, Subordinate Judge, 3rd Court of Tipperah, dated the 23rd July 1910, affirming those of Babu Hira Lal Mukerjee, Munsiff 2nd Court at Nabinagar, dated the 29th June, 1909.

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Kakarla v. *Raja Venkata* (1) dissented from.

Cases on the subject reviewed.

Appeals by the Defendants.

Suits for recovery of possession of land.

The material facts and arguments appear from the judgment of Mookerjee, J. The Courts below decreed the suit. On second appeal, the following judgment was delivered by

1914.
July, 17.

D. Chatterjee, J.—These appeals are concluded by the findings of fact arrived at by the lower appellate Court. They are therefore dismissed with costs—one set in all.

Against these decisions, the defendants preferred appeals under section 15 of the Letters Patent.

Dr. Jadu Nalh Kanjilal and *Babu Birendra Chandra Das* for the Appellants.

Babu Upendra Kumar Roy for the Respondents.

C. A. V.

The judgment of the Court was delivered by

April, 23.

Mookerjee, J.—These appeals have been preferred under clause 15 of the Letters Patent against the judgments of Mr. Justice Digambar Chatterjee in two suits for recovery of possession of land. The plaintiffs alleged that the lands in dispute constituted non-transferable occupancy holdings and yet the tenants had transferred them to the defendants. The plaintiffs consequently prayed that the defendants might be ejected as trespassers. The defendants contended that the holdings were transferable by custom and local usage. Thereupon an issue was raised in these terms: "whether raiyati lands are transferable by usage and custom without the consent of the landlord." The Court of first instance ruled, on the authority of the decision in *Peari Mohan* v. *Jote Kumar* (2), that to prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages, as the essence of usage of transferability is that transfers made to the knowledge of but without the consent of the landlord are valid and must be recognised by him. The Court examined the evidence from this point of view and came to the conclusion that it was quite insufficient to establish the alleged custom or usage. The Court held expressly that the evidence showed that the names of transferees were not recorded in the office of the landlord unless a bonus was

(1) (1905) I. L. R. 29 Mad. 24. (2) (1906) 11 C. W. N. 83.

paid and that even when bonus was offered by the transferees to the landlord, the latter had the option either to accept or refuse the same. In this view, the Court decreed the suits. Upon appeal by the defendants, the Subordinate Judge confirmed the findings of the trial Court and held that the evidence did not go to show that occupancy holdings were transferable by custom or usage. With reference to instances of transfer adduced by the defendants, the Subordinate Judge observed that, as ruled in the case of *Rajendra Kishore* v. *Chandra Nath* (1), a growing usage of transferability was of no effect against the landlord and that the usage to be effective must have already grown up. [*Buzlul Karim* v. *Satis* (2)]. In this view, the Subordinate Judge dismissed the appeals. On second appeal to this Court, Mr. Justice Digambar Chatterjee has held that the appeals were concluded by the findings of fact arrived at by the lower appellate Court. On the present appeals, Dr. Jadunath Kanjilal has argued that the evidence on the record is sufficient to establish the existence of the alleged custom or usage of transferability, and he has invited us to read the whole of the evidence on the record. In support of the course we have been asked to adopt, reference has been made to the decisions in *Eranjoli* v. *Eranjoli* (3), and *Kakarla* v. *Venkata* (4).

We have the authority of the Judicial Committee for the proposition that a decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact. In the case of *Mahammad Kamil* v. *Imtiaz Fatima* (5), the plaintiff contended that the rights of the parties were regulated by the Mahomedan law of inheritance ; the defendant set up a family custom whereby female heirs were excluded. The trial Court held that the alleged custom was not established by the evidence and this conclusion was confirmed by the Judicial Commissioner on appeal. Sir Arthur Wilson observed that the existence of the custom was a question of fact, and as the Courts in India had concurred in their judgment as to this question their Lordships saw no reason why they should not follow their usual practice of accepting concurrent findings of fact. Precisely the same language was used by Lord Collins in another case decided by the Judicial Committee. *Anant Singh* v. *Durga Singh* (6). There the question arose, whether succession in a Hindu family was regulated by a special family

(1) (1907) 12 C. W. N. 878. (2) (1911) 13 C. L. J. 418.
(3) (1883) I. L. R. 7 Mad. 3. (4) (1905) I. L. R. 29 Mad. 24.
(5) (1908) I. L. R. 31 All. 557 P. C.
(6) (1910) L. R. 37 I. A. 191 ; I. L. R. 32 All. 363.

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custom or by the ordinary Mitakshara law. The Judicial Commissioners, disagreeing with the trial Court, held that the evidence adduced by the plaintiff was not sufficient to establish the special custom. The Judicial Committee held that the question involved was one of fact only, and they saw no reason whatever to differ from the opinion of the Judicial Commissioners. The view that the question as to the existence of a custom is a question of fact is supported by numerous decisions of high authority in English Courts. Thus, in *Nelson* v. *Dahl* (1), Sir George Jessel, M. R. observed that the question whether there was a specified custom or usage in the Baltic wood trade was a question of fact and like all other customs it must be strictly proved. *In Postlethwaite* v. *Freeland* (2), Lord Blackburn held that the question whether an alleged custom of the port was established by the evidence was rightly left to the Jury. To the same effect is the decision in *Goodwin* v. *Roberts* (3) ; similarly, Channell J. observed in *Moult* v. *Halliday* (4), that the question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the Courts take judicial notice of it. A similar view has prevailed in this Court for at least half a century. Thus, in *Hureehur* v. *Judoonath* (5), Jackson, J. held that the question whether the disputed tenure was transferable by custom, was a question of fact on which the lower Court alone could pass a decision and on which the High Court could not interfere on second appeal. To the same effect is the judgment of Glover, J. in *Jaykissen* v. *Durganarayan* (6). Again, Kemp, J. observed in *Syed Ali* v. *Gopal Das* (7), that a finding upon a question of custom after going into evidence was a finding on a question of fact with which the High Court could not interfere in second appeal. Precisely the same view was taken by Farran, C. J. in *Bai Shirinbai* v. *Kharshedji* (8), where he ruled that, sitting in second appeal, it was not open to the Court to arrive at an independent finding as to whether the evidence established, as the Courts below concurrently held it did, the existence of a custom amongst Parsis which validated and rendered binding marriages contracted between children of tender age.

But, although the question of the existence of an alleged custom

(1) (1879) 12 Ch. D. 568 (575). (2) (1880) 5 App. Cas. 599 (616).
(3) (1876) L. R. 10 Ex. 337 ; (1876) 1 App. Cas. 476.
(4) (1898) 1 Q. B. 125 (129). (5) (1868) 10 W. R. 153.
(6) (1869) 11 W. R. 348. (7) (1870) 13 W. R. 420.
(8) (1896) I. L. R. 22 Bom. 430 (437).

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is a question of fact, it is conceivable that the decision may involve an error of law so as to justify the interference of the High Court in second appeal. Thus, the decision is liable to attack in second appeal on the ground that irrelevant evidence has been received, as in *Palakdhari* v. *Manners* (1) and *Durgacharan* v. *Raghunath* (2), or, that relevant evidence has been excluded, as in *Dalglish* v. *Guzuffar* (3) and *Sariatullah* v. *Prannath* (4). The decision may also be successfully attacked on the ground that there is no evidence of the alleged custom, or, as it is sometimes said, that the finding as to the existence of the custom is based on legally insufficient evidence : *Pearimohan* v. *Jotekumar* (5) ; *Hashim* v. *Abdul* (6) ; *Rambilas* v. *Lal Bahadur* (7). The decision may, again be assailed on the ground that the facts found do not constitute evidence of the alleged custom [*Durgacharan* v. *Raghunath* (2); *Hanumantamma* v. *Rami Reddi* (8) ; *Mira Bivi* v. *Villayanna* (9) ; *Subhadra* v. *Tribhuban* (10)]. The decision may further be liable to attack on the ground that in the determination of the question in controversy, legal principles or tests have been erroneously applied, for instance, that the Court has not correctly appreciated the essential attributes of a custom [*Mahamaya* v. *Haridas* (11) ; *Desai* v. *Rawal* (12) ; *Prodyot* v. *Gopi* (13)], or of a usage [*Dalglish* v. *Guzuffer* (3) ; *Palakdhari* v. *Manners* (1)] or has overlooked the distinction between a custom and a usage [*Nelson* v. *Dahl* (14)]. Consequently, the question, whether the facts found in any given instance prove the existence of the essential attributes of a custom or a usage is a question of law, which may be discussed in second appeal [*Durgacharan* v. *Raghunath* (2) ; *Lalman* v. *Nandalal* (15)]. Obviously, the question whether a custom is reasonable or valid, is a question of law [*Hurry Churn* v. *Nimaichand* (16) ; *Gurai* v. *Kuarmoni* (17)]. Subject to these qualifications, it is plain that the mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal [*Kurani* v. *Sajani*

(1) (1895) I. L. R. 23 Calc. 179. (2) (1913) 18 C. W. N. 55.
(3) (1896) I. L. R. 23 Calc. 427. (4) (1898) I. L. R. 26 Calc. 184.
(5) (1906) 11 C. W. N. 83. (6) (1906) I. L. R. 28 All. 698.
(7) (1908) I. L. R. 30 All. 311 F. B. (8) (1880) I. L. R. 4 Mad. 272.
(9) (1885) I. L. R. 8 Mad. 464.
(10) (1912) 15 I. C. 247.
(11) (1914) 20 C. L. J. 183 ; I. L. R. 42 Calc. 455 (471).
(12) (1895) I. L. R. 21 Bom. 110. (13) (1909) 11 C. L. J. 209.
(14) (1879) 12 Ch. D. 568.
(15) (1913) 17 Oudh Case 1.
(16) (1883) I. L. R. 10 Calc. 138. (17) (1915) 19 C. W. N. 1188.

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Kanta (1); *Hashim* v. *Abdul* (2); *Girraj* v. *Haragobind* (3); *Makund* v. *Krishna* (4); *Ganesh* v. *Sukhraj* (5); *Lalman* v. *Nand Lal* (6); *Mahadeo* v. *Nabi Buksh* (7)]. We are not unmindful that a contrary view was adopted in the case of *Kakarla* v. *Raja Venkata* (8), in which it was ruled that it is the duty of the Court in second appeal, when a question of custom is raised, to examine the evidence not merely with a view to ascertain whether all the essential elements have been proved to exist but also whether the evidence is credible. We respectfully dissent from this view, which, in our opinion, finds no support from section 100 (1) (*a*) (*b*) of the Civil Procedure Code, 1908. No doubt, a second appeal lies to the High Court on the ground that the decision is contrary to, or has failed to determine some material issue of, "usage having the force of law." But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law. In so far as the contrary view was taken in the cases of *Ram Harakh* v. *Issardat* (9); *Shahbaz* v. *Rahiman* (10); *Kakarla* v. *Raja Venkata* (8) and possibly also to some extent in *Eranjoli* v. *Eranjoli* (11). We are not prepared to accept them as correct expositions of the law. The substance of the matter is that while the question whether a given state of facts established a binding custom or usage is a question of law, the question whether such a state of facts has been proved by the evidence is a question of fact.

In the case before us, no question of law obviously arises upon the facts found by the lower Appellate Court in concurrence with the Court of first instance, and we are clearly of opinion that Mr. Justice Digambar Chatterjee properly declined to examine the oral and documentary evidence with a view to determine whether the Subordinate Judge was correct in his conclusion as to its insufficiency to establish the alleged custom or usage. The appeals fail and must be dismissed with costs.

A. T. M. *Appeals dismissed.*

(1) (1908) 12 C. W. N. 539.
(2) (1906) I. L. R. 28 All. 698.
(3) (1909) I. L. R. 32 All. 125.
(4) (1911) 9 I. C. 839.
(5) (1911) 14 I. C. 12.
(6) (1913) 17 Oudh Case 1.
(7) (1914) 25 I. C. 104.
(8) (1905) I. L. R. 29 Mad. 24.
(9) (1909) 3 I. C. 558.
(10) (1911) 11 I. C. 536.
(11) (1883) I. L. R. 7 Mad. 3.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

AMBAR ALI AND OTHERS

v.

LUTFE ALI AND OTHERS.*

CIVIL.
1917.
March, 6.
April, 23.

Admissibility in evidence—Entry in draft record of rights—Admission—Persons jointly interested in the subject matter of suit—Identity in legal interest—Co-party in litigation—Evidence Act (I of 1872), Secs. 18, 32 (3)—Objection as to admissibility of document in evidence, when to be taken.

An entry in a draft record of rights that a certain tank is known by a certain name, is not admissible in evidence.

An admission is good evidence against the makers of a conveyance.

When several persons are jointly interested in the subject matter of a suit, an admission of one of these persons is receivable not only against himself but also against the others, whether they be all jointly suing or sued, provided that the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is of fundamental importance. *Blenkinsopp* v. *Blenkinsopp* (1) referred to. The joint ownership must exist at the time the statement was made.

The declaration of one of two joint owners is admissible against the other, if made at a time after the joint interest came into existence; if made before they became joint owners, the declaration is not admissible. The admission of one co-plaintiff or co-defendant is not receivable against another, merely by virtue of his position as a co-party in the litigation.

The admission of one co-plaintiff or co-defendant that the land conveyed was limited by certain boundaries, is admissible against the other under section 32 (3) of the Evidence Act. The statement is accepted not merely as to the specific fact against the interest, but also as to every fact contained in the same statement.

An erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But the Court will not entertain, for the first time in appeal, an objection that a document which *per se* is not inadmissible in evidence, has been improperly admitted in evidence.

Appeal by the Defendants.

Suit for recovery of possession of a tank on declaration of title.

* Letters Patent Appeal No. 121 of 1915, against the decision of Mr. Justice Newbould, dated the 30th June, 1915, in Appeal from Appellate Decree No. 1525 of 1914, against the decree of Babu Ganendra Nath Mukherjee, Subordinate Judge, 1st Court, of Tipperah, dated the 18th February, 1914, reversing that of Babu Nogendra Nath Bhattacharjee, Munsiff, 6th Court, of Comilla, dated the 15th January, 1913.

(1) (1848) 11 Beav. 134; 2 Phillip 607; 78 R. R. 216.

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The material facts and arguments appear from the judgment of Mookerjee J.

The primiary Court dismissed the suit. That decree was reversed on appeal. The decree of the first appellate Court was affirmed on second appeal by the following judgment of

Newbould, J.—The plaintiffs have obtained a decree establishing their title to a certain tank and for ejectment of the defendants. The points taken in this appeal are that in coming to the decision in favour of the plaintiffs, the lower appellate Court has relied on certain documents which are inadmissible in evidence, and secondly that the suit is bad for non-joinder. The documents to which the objection is taken are deeds of sale executed by defendants Nos. 4 and 5 in which the tank in dispute is described as Lascar Gaji's tank. The fact that the tank is so-called is an important point in this case. The plaintiffs based their claim on the allegation that they are descendants of this Lascar Gaji.

It is contended that though the statements in those deeds of sales are admissible against defendants Nos. 4 and 5 they are no evidence against defendants 1, 2 and 3. As however, all these five defendants claim under the same title, evidence admitted against one may be taken into consideration as against them all. The second document to which an objection is taken is an uncorrected copy of the record-of-rights. This, I agree, should not be treated as evidence. As the entry in which the tank was described as Lascar Gaji's tank was subsequently expunged, it seems unlikely that much weight was given to this piece of evidence. There is other evidence on the record which is sufficient to support this finding.

As regards non-joinder, it appears from the judgment of the Munsiff that in the first Court no objection was taken that any person other than the Maharaja was a necessary party to the suit. I see no reason for holding that the plaintiffs are not entitled to the decree obtained by them. I, therefore, dismiss this appeal with costs.

Against this decision, the defendants preferred an appeal under section 15 of the Letters Patent.

Babu Birendra Chandra Das for the Appellants.

Babu Ramdoyal De for the Respondents.

C. A. V.

The judgment of the Court was delivered by

April, 23.

Mookerjee, J.—This is an appeal, under clause 15 of the Letters Patent, from the judgment of Mr. Justice Newbould in a

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suit for recovery of possession of a tank on declaration of title. The plaintiffs alleged that the disputed tank had been excavated by their ancestor Laskar Gazi Mozumdar about a century ago, that it had always been known by his name and has been owned and possessed by members of the family from generation to generation, and that they themselves were in peaceful possession when they were forcibly dispossessed by the defendants in 1911. They accordingly instituted this suit on the 27th November, 1911, for recovery of possession on establishment of title. The defendants contended that the tank was not known by the name of Laskar Gazi and was never held by his descendants. They asserted that it had been abandoned by the previous owners, had become silted up and had ultimately been settled with them on the 24th October, 1911, by the proprietor of the estate, the Maharaja of Tipperah. The trial Court held that the plaintiffs had failed to establish their alleged ancestral right to the tank and that their claim, even if well-founded, was barred by limitation. Upon appeal, the Subordinate Judge reversed the decision, as upon the question of title as also of possession he found in favour of the plaintiff. On second appeal to this Court, the decree of the Subordinate Judge was assailed on the ground that he had based his conclusion upon two pieces of evidence not admissible in law. Mr. Justice Newbould overruled this contention and dismissed the appeal. The objections urged before him have been reiterated in this Court.

One of the substantial points in controversy between the parties was, whether, as alleged by the plaintiffs, the tank was known by the name of Laskar Gazi. Besides oral testimony, the plaintiffs relied upon two pieces of documentary evidence, namely, *first*, an entry in a draft record-of-rights, and, *secondly*, a recital contained in a conveyance of an adjoining piece of land executed by the fourth and fifth defendants in favour of a stranger on the 7th October, 1894. The Subordinate Judge has relied upon both these documents, and the question for consideration is, whether they are admissible in evidence against the defendants.

As regards the entry in the draft record-of-rights to the effect that the tank is known by the name of Laskar Gazi, there can be no room for controversy that it was not admissible in evidence. *Gulab Koer* v. *Ramratan* (1). No reference should, consequently, have been made to the entry in the draft record, especially as it transpires that the entry was omitted from the record finally published on

(1) (1913) 18 C. W. N. 896.

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the 7th December, 1898, to which alone the presumption of correctness applies. The circumstance mentioned, however, does not vitiate the judgment of the Subordinate Judge, because it is plain that the lower appellate Court arrived at the conclusion on the merits independently of the evidence improperly admitted [*Womes* v. *Chundee* (1)].

As regards the recital in the conveyance, the position is somewhat different, and requires closer examination. On the 27th August, 1894, the fourth and fifth defendants acquired title by purchase to a parcel of land on the border of the tank now in dispute. On the 7th October, 1894, they sold that land to one Hamidunnessa Bibi. In the schedule of boundaries in that conveyance, they stated that the land then transferred was bounded by the tank of Laskar Gazi. The conveyance was produced at the trial by the scribe, was duly proved and was admitted in evidence without objection. The Subordinate Judge has used the recital as valuable evidence, not only against the fourth and fifth defendants who executed the conveyance, but also against the other defendants who were not parties to that transaction. There can be no room for controversy that the admission is good evidence against the makers of the conveyance, but the question arises whether it is admissible against the other defendants. These defendants, it will be observed, are jointly interested in the land now in dispute, along with the fourth and fifth defendants; in fact, they claim under a common lease from the landlord and have, on the basis thereof, taken a common defence to defeat the suit of the plaintiffs. But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction. They consequently press the view that an admission made by the owners of that property cannot be received in evidence against them, merely because, since the date of the alleged admission, they have jointly acquired the property now in suit. In our opinion, this contention is well-founded and section 18 of the Indian Evidence Act is of no assistance to the plaintiffs. The principle which regulates the reception in evidence of an admission by one defendant as against another defendant, was formulated in the cases of *Kowsulliah* v. *Mukta Sundari* (2); *Chalho Singh* v. *Jharo Singh* (3) and *Meajan* v. *Alimuddi* (4). The principle is that when several persons are jointly interested in the subject matter of the suit, an admission of any one of these persons is receivable not only against himself but also

(1) (1881) I. L. R. 7 Calc. 293. (2) (1885) I. L. R. 11 Calc. 588.
(3) (1911) I. L. R. 39 Calc. 995. (4) (1916) I. L. R. 44 Calc. 130.

against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is of fundamental importance: *Blenkinsopp* v. *Blenkinsopp* (1). On this principle, the position has been maintained that the joint-ownership must have existed at the time the statement was made. Thus, in *Blakeney* v. *Fergusson* (2), it was ruled that the admission of one person cannot be admitted in evidence against another on the ground of a joint interest in the subject, unless the interest is a subsisting one at the time of the admission, and where the interest is derivative, it must have been acquired after the admission was made. To the same effect is the rule enunciated in *Kilburn* v. *Ritchie* (3), that the declaration of one of two joint-owners is admissible against the other, if made at a time after the joint interest came into existence; if made before they became joint-owners, the declaration is not admissible. The distinction is based upon obvious good sense. The admission of one co-plaintiff or co-defendant is not receivable against another, merely by virtue of his position as a co-party in the litigation; if the rule were otherwise, it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other; it must be because of some privity of title or of obligation [see the observations of Erskine L. C. in *Morse* v. *Royal* (4), and of Ellenborough, C. J. in *R.* v. *Hardwicke* (5)]. The vital point for consideration, accordingly, is, whether there is such privity of obligation or title between two persons as to justify the use of the admission of one against the other; and, plainly, this must be determined by reference to the relation between the parties at the time the admission is made. As a matter of probative value, the admission of a person (such as one joint-owner) having precisely the same interest at stake as another, (his co-owner), will, in general, be likely to be equally worthy of consideration; there being an identity of legal liability, the two persons may be deemed one so far as affects the propriety of discrediting one by the statements of the other. This reason,

(1) (1848) 11 Beav. 134; 2 Phillip. 607; 78 R. R. 216.
(2) (1854) 14 Ark. 641.
(3) (1852) 2 Cal. 145; 56 Am. Dec. 326.
(4) (1806) 12 Ves. 355 (361).
(5) (1809) 11 East 578 (585).

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however, ceases to be applicable where, as in the case before us, the admission was made at a time when the parties had no community of interest. The inference is thus irresistible that the recital in the conveyance of 1894, though admissible against the fourth and fifth defendants, is not admissible as admissions against the other defendants under section 18 of the Indian Evidence Act.

The question next arises, whether the recital in the conveyance is admissible against these defendants on any other principle. The decisions in *Abdullah* v. *Kunj Behary Lal* (1); *Imrit* v. *Sirdhari* (2), and *Natwar* v. *Alkhu* (3) show that the statement is admissible under section 32 (3) of the Indian Evidence Act. The statement by the vendors, that their land then conveyed was limited by certain boundaries, was an admission that their proprietary interest did not extend over any land outside the boundaries mentioned. The entire statement was, consequently, admissible [*Higham* v. *Ridgway* (4); *Connor* v. *Fitzgerald* (5); *Percival* v. *Nanson* (6); *Smith* v. *Blakey* (7); *R.* v. *Exeter* (8)]. The principle is that the statement is accepted, not merely as to the specific fact against the interest, but also as to every fact contained in the same statement. Here, however, the plaintiffs have to face an unexpected difficulty. The statement can be made admissible under section 32 (3), only if the conditions mentioned in the introductory words of the section are fulfilled, and those conditions admittedly have not been fulfilled in this case. Consequently, the plaintiffs cannot avail themselves of section 32 (3), and, there thus seems, at first sight, no escape from the position that while the appeal must be dismissed so far as the fourth and fifth defendants are concerned, the case must be remitted for re-consideration at the instance of the other defendants after exclusion of the recital in the conveyance. On careful consideration, however, of all the circumstances of the case, another aspect of the matter emerges for examination.

It is plain that if the plaintiffs had cited the fourth and fifth defendants as witnesses, the recital in the conveyance executed by them could have been received in evidence to impeach their credit under section 155 (3) or to corroborate their testimony under section 157. Now, in the case before us, no objection was taken to the reception of the conveyance in evidence by any of the defendants. If such objection had been taken, it would had been

(1) (1911) 14 C. L. J. 467.
(2) (1911) 15 C. L. J. 7.
(3) (1913) 11 All. L. J. 139.
(4) (1808) 10 East 109; 2 Smith's L. C. 301.
(5) (1883) 11 L. R. Ir. 106.
(6) (1851) 7 Exch. 1.
(7) (1861) 2 Q. B. 326.
(8) (1869) L. R. 4 Q. B. 344.

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open to the plaintiff to avoid the difficulty by citing the fourth and fifth defendants as witnesses and by proceeding under section 155 (3) if they repudiated their admissions. It is perfectly true, as pointed out by Sir Richard Couch in *Miller* v. *Madho Das* (1), that an erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But it is equally well-settled that the Court will not entertain, for the first time in appeal, an objection that a document, which *per se* is not inadmissible in evidence, has been improperly admitted in evidence. *Girindra* v. *Rajendra* (2); *Preonath* v. *Durgatarini* (3). It is plain that the case before us falls within the latter principle. Assume for a moment that we accede to the contention of the appellants other than the fourth and fifth defendants. We shall have to confirm the decree of the Subordinate Judge in favour of the plaintiffs against these defendants, and to set aside his decree as regards the other defendants; we shall then have to remit the case in part to the Subordinate Judge, allow the plaintiffs an opportunity to make the conveyance legally admissible in evidence, and, if they fail to do so, to take the chance of success upon the balance of evidence. The plaintiffs will forthwith proceed to cite the fourth and fifth defendants as witnesses, and, they will be in a position to do so with reasonable safety, as the claim of these defendants will have been finally negatived by our decree. When these defendants are examined as witnesses, the plaintiffs will be free to introduce the conveyance into evidence to corroborate or contradict them as the contingency may require. The Court will then have to reconsider the case upon practically the same evidence as has formed the basis of the decision now under appeal. No useful purpose is likely to be served by the adoption of such a course in a litigation which has already lasted for nearly six years. We are, consequently, of opinion that in these circumstances the decree of Mr. Justice Newbould should be confirmed and this appeal dismissed with costs.

A. T. M. *Appeal dismissed.*

(1) (1896) L. R. 23 I. A. 106; I. L. R. 19 All. 76.
(2) (1897) 1 C. W. N. 530. (3) (1911) 14 C. L. J. 578.

Before Sir John Woodroffe, Knight, Judge, and Mr. Justice Cuming.

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March, 27, 30.

MANINDRA NATH GHOSE AND OTHERS

v.

ASHUTOSH GHOSE.*

Rent, decree for—Putnidar suing for rent—Sale of putni under Putni Regulation (VIII of 1819)—Putni sale set aside—Rent decree, execution of—Sale proclamation, issue of—Subsequent sale of putni under Putni Regulation.

The respondent was the owner of a certain *putni* taluk. The appellants held a Jama of certain land within the taluk under the respondent. The *putni* taluk was sold in November 1909 at the instance of the zemindar under Putni Regulation. This sale was set aside in February 1911.

On the 14th April 1910, the respondent brought a suit for rent against the appellants and obtained a decree in January 1911. On the 20th January, 1914, an application was made for execution of the said decree. An order for sale proclamation and attachment was made on the 2nd August, 1915, on an application made for the same on the 27th April, 1915, under section 163 of the Bengal Tenancy Act.

On the 15th May, 1915, the putni taluk of the respondent was once more sold under Putni Regulation :

Held, that the respondent was a landlord at the time of the rent suit and the decree obtained by him in January, 1911, was a rent decree.

That the decree could be executed as a rent decree.

Khetra Pal Singh v. *Kritarthamoyi Dassi* (1) followed.

Appeal by the judgment-debtors.

Application for execution of decree.

The material facts and arguments appear from the judgment.

Babu Bepin Behary Ghose for the Appellants.

Babu Jogendra Kumar Dey for the Respondent.

C. A. V.

March, 30.

The judgment of the Court was as follows :

This appeal arises out of certain execution proceedings. The facts are briefly these : The respondent is or rather was the owner of a certain Putni Taluk called Mouza Khasmara. The appellants hold a jama of some 5 bighas and odd cottahs at an annual rental of Rs. 27-2-8 within the taluk under the respondents. Their contention is that they have a non-transferable occupancy right in these

* Appeal from Appellate Order No. 106 of 1916, against the order of Babu Lalit Mohan Das, Subordinate Judge, 3rd Court of Hooghly, dated the 29th February, 1916, affirming that of Babu Nripendra Nath Guha, Munsiff, 1st Court at Howrah, dated the 31st July, 1915.

(1) (1906) I. L. R. 33 Calc. 566 ; 3 C. L. J. 470.

five bighas. The taluk belonging to the respondent was sold in November 1909, at the instance of the zemindar under Regulation VIII of 1819.

On the 14th April 1910 the respondent who was the Putnidar brought a suit for rent of the 5 bighas odd against the present appellant and obtained a decree in January 1911. In February 1911, the sale of the respondent's putni taluk was set aside.

On the 20th January 1914, the respondent applied for the execution of the rent decree which he had obtained for the 5 bighas odd of land in January 1911, against the present appellant. The proceedings appear to have dragged on for some time.

On the 27th April 1915 it was ordered that sale proclamation and attachment should be issued under section 163 Bengal Tenancy Act and the same order was passed on the 2nd August 1915.

On the 15th May 1915, the *putni* taluk of the respondent under which appellant held these 5 bighas odd was once more sold under Regulation VIII. Then on the 10th July, the present appellant appeared and objected to the sale of the holding on two grounds :—

(1) That the decree could not be executed as a rent decree as the decree-holder was no longer the landlord.

(2) That it could not be executed as a money decree as the appellant had no transferable interest in it.

The learned Munsiff found the first objection in favour of the respondent decree-holder. He did not therefore find it necessary to decide the second objection. The judgment-debtor then appealed. The learned Subordinate Judge dismissed the appeal. He held that the case was covered by the Full Bench ruling, *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (1) and distinguished the case from the Privy Council decision *Forbes* v. *Moharaj Bahadur Singh* (2). He held that the Privy Council case did not over-rule the Full Bench decision *Khetra Pal Singh* v. *Krithartha-moyi Dassi* (1). He held that the decree-holder had the landlords' interest vested in him at the time when he instituted the rent suit and obtained his decree and so was entitled to execute it as a rent decree even though he had lost his title as landlord before the property was put up to sale. The judgment-debtor has appealed to this Court. His contentions are two-fold :—

(1) That as the tenure was sold in 1909 and the sale was not set aside till February 1911, the decree for rent which was obtained

(1) (1906) I. L. R. 33 Calc. 566; 3 C. L. J. 470.
(2) (1914) I. L. R. 41 Calc. 926; 25 C. L. J. 434.

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in January 1911, is not a rent decree as the respondent was not then the landlord.

(2) Even it were then a rent decree the decree-holder is no longer the landlord as the putni was again sold in May 1915, and so cannot execute it as a rent decree. He contends that the Privy Council case *Forbes* v. *Moharaj Bahadur Singh* (1) over-rules the Full Bench case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2).

The respondent argues that with regard to the first contention as the status of decree-holder as landlord was restored in February 1911, he must be considered to have been a landlord at the time of the rent suit. This is the view of the lower appellate Court with which we agree. The case is thus within the Full Bench decision as the relation of landlord and tenant existed when the suit was brought and decree was given therein.

With regard to the second contention the respondent submits that the Privy Council case does not over-rule the Full Bench decision.

It cannot, we think, be said that the Privy Council over-ruled the Full Bench decision to which they referred and distinguished from the case before them. They laid down however certain principles which if applicable fully and in all cases are, as pointed out in the case of *Kumar Prafulla Krishna Deb* v. *Nosibannessa Bibi* (3) inconsistent with those upon which the Privy Council judgment proceeds. But every judgment must be read as applicable to the particular facts proved and the general expressions used must be considered to be governed and qualified by the particular facts of the case in which such expressions are found. A case is an authority for what it decides and not for what may seem to follow logically from it. If the Privy Council had considered the Full Bench decision to be erroneous, they would have doubtless said so. The facts of the case before them were wholly different, as the relationship of landlord had in the Privy Council case ceased before the suit was brought. In the result, the decision under appeal must be affirmed and the appeal dismissed with costs.

A. T. M. *Appeal dismissed.*

(1) (1914) I. L. R. 41 Calc. 926 ; 25 C. L. J. 434.
(2) (1906) I. L. R. 33 Calc. 566 ; 3 C. L. J. 470.
(3) (1916) 24 C. L. J. 331.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

SYEDUNNESSA KHATUN

v.

AMIRUDDI AND ANOTHER.*

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March, 9, 12. April, 23.

Execution sale, effect of—Decree-holder, sole landlord at the date of application for execution—Decree-holder losing his interest as landlord before the actual sale.

Where the decree-holder continued to be the sole landlord at the date of the application for execution of the decree for rent, and in his character as landlord decree-holder, took the necessary steps for sale of the under-tenure in conformity with the statutory provisions, the effect of the execution sale is to pass the under-tenure to the purchaser, even though the decree-holder has lost his interest as landlord before the actual sale.

Cases on the subject reviewed.

Appeal by the Plaintiff.

Suit for recovery of possession of land on declaration of title.

The material facts and arguments appear from the judgment of Mullick, J.

The primary Court decreed the suit. That decree was affirmed by the first appellate Court. The decree was reversed by the following judgment of

1915.

July, 30.

Mullick, J.—There were three under-tenures, namely, Osat Taluk Naba Kishore, Howla Chandra Sekhar and Howla Haronath the proprietors of which were the Guhas. In 1290 B. S. the Guhas mortgaged to one Raj Kumar half of the Osat taluk and half of the Howla Chandra Sekhar. By a Kabala dated the 1st Chait 1295 B. S. they then sold their proprietary interest to the plaintiff and on the same date executed a *darmirash* kabuliyat in her favour. On the 18th Magh 1296 B. S., being unable to pay the dues on the mortgage of 1290 they executed a *kistbandi* in favour of Raj Kumar. Raj Kumar sued upon his mortgage on 13th Falgoon 1303, and obtained a decree on the 10th November, 1897, corresponding to 24th Kartik, 1304, B. S. In 1908 the plaintiff sued the Guhas for arrears of rent in respect of the *darmirash* and after realising some money in execution eventually brought the tenure to sale, on the

* Letters Patent Appeal No. 137 of 1915, against the decision of Mr. Justice Mullick, dated the 30th July, 1915, in Appeal from Appellate Decree No. 1666 of 1914, against the decision of Babu Syama Charan Banerjee, Subordinate Judge of Backergunge, dated the 16th February, 1914, affirming that of Babu Aswini Kumar Das Gupta, Munsiff of Barisal, dated the 30th September, 1912.

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15th February 1905, and purchased it herself. It appears, however, that the sale in execution of Raj Kumar's mortgage decree was held on the 20th January, 1909, and that, at this sale, the Barisal Loan Company purchased one of the properties, namely, the half of Howla Chandra Sekhar.

* * * * * *

In suit No. 270 out of which arises the second appeal No. 1666 of 1914, the defendant is Amiruddin and under-tenure is a Nim Osat Howla as described in Khewat 57.

I shall take up these cases separately.

* * * * * *

Suit No. 270.

In this suit the only point in addition to that relating to registration already dealt with above is whether at the time of her purchase at the auction sale the plaintiff had the 16 annas interest in the property. It is established that the Loan Company had purchased the half share of the Howla Chandra Sekhar at the mortgage sale on the 20th January, 1909. Therefore, on the 15th February, 1909, when the plaintiff brought the *darmirash* tenures to sale, the plaintiff was not the 16 annas landlord in respect of these properties. Therefore according to the ruling of the Privy Council in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1), the plaintiff was not the purchaser in execution of a rent decree. This ruling of the Privy Council as I understand it, overrules the decision of the Full Bench in *Khetra Pal Singh Roy* v. *Kritarthamoyi Dassi* (2), upon which both the Lower Courts have relied. The decree of the learned Subordinate Judge will be set aside and the plaintiff will get a declaration of her title in respect of her share. The appeal is, therefore, decreed with costs, although the respondents do not appear.

Against this decision, the plaintiff in S. A. No. 1666 of 1914, preferred an appeal under section 15 of the Letters Patent.

Maulvi A. K. Fazlul Huque and *Babu Kali Prasanna Pjplai* for the Appellant.

Babu Abinas Chandra Guha for the Respondent.

The judgment of the Court was delivered by

April, 23,

Mookerjee, J.—This is an appeal, under clause 15 of the Letters Patent, from the judgment of Mr. Justice Mullick in a suit for recovery of possession of land on declaration of title. The case for the plaintiff is that, on the 19th February, 1908, she obtained a decree for rent against an

(1) (1914) 25 C. L. J. 434; I. L. R. 41 Calc. 926.
(2) (1906) I. L. R. 33 Calc. 566; 3 C. L. J. 470.

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under-tenure holder, that she executed the decree in accordance with the special procedure prescribed in Chapter XIV of the Bengal Tenancy Act, and that on the 15th February, 1909, she purchased the defaulting under-tenure at the execution sale. When she proceeded to take possession of the property through Court on the 17th July, 1909, the present defendants declined to deliver up possession to her on the allegation that they were in possession as holders of a subordinate under-tenure lawfully created by the defaulter. The plaintiff thereupon proceeded to annul the alleged incumbrance by service of notice in accordance with the provisions of section 167 of the Bengal Tenancy Act, and, subsequently, on the 7th July, 1911, instituted the present suit for ejectment of the defendants. The defendants pleaded that inasmuch as a half share of the interest of the plaintiff as superior landlord had been sold in execution of a mortgage decree against her on the 20th January, 1909, and as, consequently, she had ceased to be the sole landlord on that date, the sale held on the 15th February, 1909, operated, not as a sale under the Bengal Tenancy Act, but only as a sale of the right, title and interest of the judgment-debtor under the Code of Civil Procedure. The trial Court over-ruled this contention and decreed the suit. On appeal to the Subordinate Judge, the decree of the Court of first instance was affirmed. On second appeal to this Court, Mr. Justice Mullick has held that the contention of the defendants must prevail, on the authority of the decision of the Judicial Committee in *Forbes* v. *Maharaj Bahadur Singh* (1), and in this view, he has dismissed the suit. The question of the effect of the execution sale held on the 15th February, 1909, is the sole point for consideration in the present appeal.

The history of judicial opinion on the question of the effect of the cessation, partial or entire, of the interest of a landlord on his right to enforce realisation of arrears of rent by sale of the tenancy under the special procedure prescribed in the Bengal Tenancy Act, may be briefly reviewed. In *Hem Chandra Bhanja* v. *Monmohini Dasi* (2), the interest of the landlord ceased after he had obtained a decree for rent in respect of a saleable under-tenure. It was ruled by O'kinealy and Ameer Ali, JJ., that he could not thereafter bring the tenure itself to sale in execution of the decree in conformity with the special provisions of the Bengal Tenancy Act. In *Chhatrapat Singh* v. *Gopichand Bothra* (3), the landlord lost his interest

(1) (1914) I. L. R. 41 Calc. 926; 25 C. L. J. 434.

(2) (1899) 3 C. W. N. 604.

(3) (1899) I. L. R. 25 Calc. 750; 4 C. W. N. 446.

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after the institution of the suit for arrears of rent and before the decree was made in his favour. It was ruled by Macpherson and Ameer Ali, JJ., that the decree so made had all the characteristics of a rent decree under the Bengal Tenancy Act. In *Sreemunt Ray* v. *Mahadeo Mahata* (1), the landlord lost his interest before the institution of the suit for arrears of rent, by reason of the expiry of the term of his own lease. It was ruled by Harington and Brett, JJ. that he could, in execution of his decree for rent, sell only the right, title and interest of the tenant as existing at the time of the sale. In this state of the authorities, the matter came before a Full Bench of this Court in the case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2). In that case, the landlord had parted with her interest after she had obtained a decree for arrears of rent and before she applied to execute the decree. It was ruled that the decree was capable of execution as a rent-decree at her instance. Sir Francis Maclean, C. J. held that if at the time when the rent suit is instituted and the rent decree made, the plaintiff is still the landlord, the decree is liable to be executed at his instance as a rent decree, notwithstanding that he has parted with his interest as landlord before he applies for execution. It may be observed that the Full Bench dissented from the decision in *Hem Chandra* v. *Monmohini* (3), which was indistinguishable on the facts. We come finally to the decision of the Judicial Committee in *Forbes* v. *Maharaj Bahadur Singh* (4). There, the landlord lost his interest before the institution of the suit for arrears of rent and was consequently not the landlord at the time when the decree was obtained or the application was made for its execution. A Division Bench of this Court, Rampini and Sharfuddin, JJ., [*Maharajah Bahadur Singh* v. *Forbes* (5),] held that the decree operated as a decree for rent. The Court treated the decisions in *Hem Chandra* v. *Monmohini* (3), and *Sreemant* v. *Mahadeo* (1), as overruled by the Full Bench in *Khetra Pal* v. *Kritarthamoyi* (2), although the facts of the case before the Full Bench were different from those of the case then before the Court in a material particular, namely, while in the one case the landlord had lost his interest before the institution of the suit for rent, in the other he lost his interest after he had obtained his decree for rent.

(1) (1904) I. L. R. 31 Calc. 550.
(2) (1906) I. L. R. 33 Cal. 566; 3 C. L. J. 470.
(3) (1899) 3 W. N. 604.
(4) (1914) I. L. R. 41 Calc. 926; 25 C. L. J. 434.
(5) (1908) I. L. R. 35 Calc. 737; 7 C. L. J. 652.

The case was then taken up on appeal to the judicial committee, and the decision of this Court was reversed. In the elaborate judgment delivered by Mr. Ameer Ali who, it will be observed, was a party to the conflicting decisions in *Hem Chandra* v. *Monmohini* (1), and *Chhatrapat* v. *Gopi Chand* (2), the provisions of the Bengal Tenancy Act relating to rent were reviewed; but the Judicial Committee did not in express terms overrule the decision of the Full Bench in *Khetra Pal* v. *Kritarthamoyi* (3), proceeded, on the other hand, to observe that the High Court had fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal. The facts of the case before us are substantially different from those of the cases already mentioned, and, consequently, we are not called upon to consider the question which formed the subject matter of reference to a special Bench in *Praphulla* v. *Nasibunnessa* (4), namely, whether the decision of the Full Bench has been in essence overruled by the decision of the Judicial Committee. As we have observed, we are not concluded here by any of the decisions just analysed, and we are not prepared to apply to this case isolated dicta from the judgment of the Judicial Committee pronounced in a case where the facts were in essential particulars different from those of the litigation before us, otherwise there would be a manifest abuse of judicial precedents, which has been condemned by Lord Halsbury in *Quinn* v. *Leatham* (5), and by Lord Haldane in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (6) The view thus emphasised had been recognised many years earlier by Marshall C. J. in *Brooks* v. *Marbury* (7), where he observed that the language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts [*U. S.* v. *Burr* (8)].

What, then, is the position of the parties, when tested from the point of view of principle? The plaintiff was the sole landlord at the date of the institution of the suit for arrears of rent, at the date of the decree, and at the time when the application for execution was made. The application was made in accordance with the special procedure prescribed in Chapter XIV of the Bengal Tenancy Act

(1) (1899) 3 C. W. N. 604. (2) (1899) I. L. R. 26 Calc. 750.
(3) (1906) I. L. R. 33 Calc. 566 : 3 C. L. J. 470.
(4) (1916) 24 C. L. J. 331. (5) (1901) App. Cas. 495 (506).
(6) (1914) App. Cas. 25 (40). (7) (1825) 11 Wheaton 78 (90).
(8) (1808) 4 Cranch 470, (482, 488).

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for execution of decrees for arrears of rent. Proceedings were thereupon taken under section 163 for simultaneous issue of writ of attachment and proclamation of sale; and it cannot be disputed that this was done in strict conformity with the position of the decree-holder at the time. Does it, then, make any difference that the decree-holder lost a part of his interest as landlord before the sale was actually held by the Court? In our opinion, the answer must be in the negative The legal effect of the sale should depend upon the status of the decree-holder at the time the proceedings for sale were taken by the Court at her instance. She was competent to ask the Court to bring the defaulting under-tenure to sale and to adopt for that purpose the measures presented by the statute. Those measures were duly adopted, and the property was brought to sale in conformity therewith. The respondents have not been able to invoke the aid of any intelligible principle by which the legal effect of the sale can under such circumstances be made to depend, not upon the true character of the proceedings in execution duly taken but the relative situation of the parties at the moment of the sale. We are of opinion that, in a case of this description, where the decree-holder continued to be the sole landlord at the date of the application for execution of the decree, and, in his character as landlord decree-holder, took the necessary steps for sale of the under-tenure in conformity with the statutory provisions, the effect of the execution sale is to pass the under tenure to the purchaser, even though the decree-holder has lost his interest as landlord before the actual sale.

The result is that this appeal must be allowed and the decree of the Subordinate Judge restored with costs of both hearings in this Court.

A. T. M. *L. P. Appeal allowed: Suit decreed.*

Before Mr. Justice Fletcher and Mr. Justice Smither.

HAJRA SARDAR AND OTHERS

v.

KUNJA BEHARI NAG CHAUDHURY.*

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March, 19, 20.

Lease, continuance of—Trespasser—Adverse possession—Possession adverse against lessee, if adverse against the lessor.

The possession of a trespasser during the continuance of a lease does not become adverse as against the lessor.

Mr. C. T. Davis v. *Kasee Abdool Hamed* (1) and *Kishwar Nath Sahi Deo* v. *Kali Sankar Sahai* (2) followed.

Prosunnomoyi Dasi v. *Kali Das Roy* (3) and *Brindaban Chunder Sircar Chowdhry* v. *Bhoopal Chunder Biswas* (4) dissented from.

Appeal by the Defendants Nos. 1 to 3.

Suit for declaration of title.

The material facts will appear sufficiently from the judgment of Fletcher J.

Dr. Dwarka Nath Mitter and *Babu Satindra Nath Mukherjee* for the Appellants.

Sir Rash Behary Ghose and *Babus Mohendra Nath Roy, Bepin Behary Ghose (Jr.), Biraj Mohan Mojumdar, Narendra Chandra Bose, Jnanendra Nath Sarkar* and *Satyendra Nath Mitter* for the Respondents.

The following judgments were delivered:

March, 20.

Fletcher, J.—This is an appeal by the defendants Nos. 1 to 3 from a judgment of the learned district Judge of the Twenty-four Perganahs, dated the 6th January 1915, affirming the decision of the Munsiff of Basirhat. The suit was brought by the plaintiff for a declaration of his Ganti right to certain chur lands. In Kismat Polta, there were two portions—the Bower Polta and the Danga Polta. The Danga Polta belonged to a certain number of zemindars and had been divided amongst them. The Bower Polta belonged to certain zemindars who are now represented by the defendants Nos. 5 to 53. The first lease that was granted of this property

* Appeal from Appellate Decree, No. 1342 of 1915, against the decision of A. H. Cuming Esq., District Judge of 24-Perganas, dated the 6th January, 1915 affirming that of Babu Gopeswar Banerjee, Munsiff at Basirhat, dated the 30th January, 1913.

(1) (1867) 8 W. R. 55.
(2) (1905) 10 C. W. N. 343.
(3) (1881) 9 C. L. R. 347.
(4) (1872) 17 W. R. 377.

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appears to have been in the Bengali year 1258. That lease of the Bower Polta was granted to one Arun Chunder Bhattacharjee. The lease in its terms excluded 321 Bighas of land. Arun in his turn granted an underlease to two persons named Jasimuddi and Gorai Mandal on the 20th Falgun 1271 B. S. corresponding to some date in March, 1865. On the 10th April 1901, an intermediate lease was granted to one Dharanath Roy Chowdhury. Then a rent suit was brought by Dharanath to recover rent from Jasimuddi and Gorai Mandal. That suit was decreed and in the sale in execution on the 29th July 1902, Dharanath Roy purchased the interest of Jasimuddi and Gorai. Dharanath Roy surrendered his ijara right in favour of Arun's son, the present defendant No. 4, on the 19th June 1903, and sold his *darganti* right to one Promoda Sundari. Then a suit for rent was brought against Promoda Sundari in the year 1908 and a decree was passed and the defendant No. 4 purchased the tenure. On the 14th July 1909, the defendant No. 4 sold his right purchased in execution to the plaintiff. When the plaintiff went to take possession in October or November 1909, he was resisted and the result was that the present suit was started in the month of August 1911.

The first point that was raised in this appeal was as to whether the plaintiff had established that the land sued for in this case was a portion of the land included in the lease to Arun. The question, it strikes me, is eminently a question of fact. But whether it is a question of fact or not, the decisions both of the primary Court and also of the lower appellate Court shew conclusively that this land is, in fact, a portion of the land let out to Arun and that the 321 Bighas which might have been Bower Polta originally had, on the date of the lease to Arun, become part of the Danga Polta.

The next argument was on the question of Limitation. The appellants before us, according to the findings of both the lower Courts, were for twenty years and upwards in possession of this land and the question that was raised in this appeal was whether the possession of the defendants was adverse as against the lessor during the subsistence of the underlease. If it was not, it is quite clear, on the facts, that the present suit was brought within time. The decisions in this Court on the point are numerous. But the decisions in favour of the appellants—where one reads the cases closely—are few and they consist, as far as I can see, amongst others, of the decision in the case of *Prosunnomoyi Dasi* v. *Kali Das Roy* (1), a decision of Mr. Justice Prinsep and Mr. Justice

(1) (1881) 9 C. L. R. 347.

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Field. That case has frequently not been followed in this Court. In my own experience while forming a member of a Bench of this Court certainly on one occasion that decision was not followed. The other case referred to is the case of *Brindaban Chunder Sircar Chowdhury* v. *Bhoopal Chuuder Biswas* (1). That decision also seems to support the argument of the appellants. The other cases that Dr. Dwarka Nath Mitter for the appellants has cited in support of his argument do not when closely read support the proposition he put forward because in every one of these cases the Court was deciding a case where property had been let out to common tenants and the Court drew attention in the course of its judgment to the difference between a case where the property was let out to common tenants and a case where the property was let out in Ijara. I do not think that these other cases cited by Dr. Dwarka Nath Mitter support the proposition that he wished to make. As against that, there is a large body of authority commencing with the case of *Mr. C. T. Davis* v. *Kazee Abdool Hamed* (2), which is followed by the decision in *Womesh Chunder Goopto* v. *Raj Narain Roy* (3), down to the latest case cited to us, namely, the case of *Kishwar Nath Sahi Dev* v. *Kali Sankar Sahai* (4). All these cases decided clearly that where the property was let out in lease, the possession of a trespasser did not become adverse as against the lessor until the termination of the lease. That, I think, is not only established by those cases but is also correct in principle. The difficulties of holding that the possession of a trespasser during the continuance of the lease could be adverse as against the lessor are serious as has been pointed out in more than one judgment. I think that the learned district Judge in the Court of appeal below was clearly right when he held that the plaintiffs' suit was not barred by adverse possession. I think, therefore, that the appeal fails and must be dismissed with costs.

The other question is the question raised on the cross-objection to the appeal, namely, that, on the findings in this case, the learned Judge ought not to have settled a fair and equitable rent as against the appellants but ought to have passed a decree for ejectment. The learned Judge has found that the appellants are trespassers. He has also found that the case that the defendants set up that they *bona fide* held the land under a person whom they believed to be the owner thereof is not a true case. The only reason for which

(1) (1872) 17 W. R. 377.
(2) (1867) 8 W. R. 55.
(3) (1868) 10 W. R. 15.
(4) (1905) 10 C. W. N. 343.

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the learned Judge thought that the defendants ought not to be ejected was that they had been in actual possession of the land for some twenty years and that, therefore, it was not equitable that they should be ejected. But if a person has been in actual possession for twenty years and there are no special circumstances such as have been laid down in the cases as to a person taking a settlement *bona fide* from a person whom he believes to be entitled to the land, the mere fact that he has been there for twenty years is no reason why he should not be ejected. On the contrary it is more reasonable that he should be ejected because he has been in possession of another man's property for a considerable number of years. The decree of the lower appellate Court in this respect has been attempted to be supported by Dr. Dwarka Nath Mitter by two decisions of this Court. But neither of these cases clearly applies to the facts of this case. The first case that has been relied upon is the case of *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (1), and the remarks that are relied on are to be found at page 138. They run as follows:—"In a case like this where the tenant encroaches not in his character as tenant but asserts as hostile title against the entire interest of his landlord, the rule laid down by this Court in the case of *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry* (2): would be applicable, namely, that if a tenant encroaches on the adjoining waste lands of the landlord, his possession of the lands encroached upon can only commence to be adverse when a title adverse to the landlord is asserted or the landlord becomes aware of the encroachment." The present case is clearly distinguishable from that rule because the encroachment in this case was not an encroachment on the adjoining land of the landlord. These lands do not belong to the persons who are the landlords of the other lands said to be held by the defendants. The only other class of cases is that class where a person has taken a *bona fide* settlement from another person whom he believed to be, in fact, the landlord and entitled to let out the land. The learned Judge in the lower appellate Court has found that the case that the defendants set up that they *bona fide* held the land under a person whom they believed to be the owner thereof was not a true case. The equity that they set up as to long possession which satisfied the learned District Judge is no ground, in my opinion, why they should be permitted to be in possession of the land which the learned Judge of the lower appellate Court has found they are holding possession of as

(1) (1905) 2 C. L. J. 125. (2) (1903) I. L. R. 31 Calc. 397.

trespassers. I think, we ought to allow the cross-objection of the plaintiff-respondent and in lieu of the decree made by the learned Judge settling a fair and equitable rent of the property we ought to direct that the defendants-appellants before us be ejected from the land in suit. The cross-objection is, therefore, allowed with costs.

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Smither, J.—I agree.

A. N. R. C. *Appeal dismissed, Cross-objection allowed.*

Before Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

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KASIM ALI AND OTHERS

v.

THE CHAIRMAN OF MUNICIPAL COMMISSIONERS, CHITTAGONG AND OTHERS.*

Bengal Municipal Act (III B. C. of 1884), Sec. 155.—'Above or below the ferry,' meaning of—'Banks'—'Municipal ferry'—Section, construction of—Right of ferry.

Per curiam : The words 'above or below the ferry' in section 155 of the Bengal Municipal Act, mean above or below the ferry along the banks of the river, and not within a radius of two miles of the ferry.

Section 155 of the Bengal Municipal Act cannot be construed in the light of the provisions of the Public Ferries Act (I of 1885 B. C.).

Per N. Chatterjea, J. : The banks referred to in the last clause of section 155 of the Bengal Municipal Act are banks of the same river, and the clause applies only to cases where one of the two banks of the same river is within and the other without the limits of the Municipality.

If the words used in section 155 are plain and construed in their ordinary sense, mean that the limits of a Municipal ferry extend to two miles 'above or below' the ferry along the banks of a river (up-stream or down-stream) the Court cannot construe the section in a different way merely because the construction of the words in their ordinary sense may, in some cases, lead to results which might seem anomalous.

Abley v. *Dale* (1) referred to.

* Appeal from Appellate Decree No. 3326 of 1915, against the decree of R. E. Jack Esq., Additional District Judge of Chittagong, dated the 6th May, 1915, reversing that of Babu Bhupal Chunder Gangooly, Munsif, 2nd Court, Chittagong, dated the 7th July, 1913.

(1) (1851) 11 C. B. 378 (391).

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Per Richardson, J. : The word ferry in the expression 'Municipal ferry' in section 155 denotes a place. It is the place where passengers are conveyed by boat from one side of a river to the other. A right of ferry is the right so to convey passengers at such a place. A ferry boat however as the term is used, means any boat used for the purpose of carrying passengers across the river whether at that place or some other place.

To come within the prohibition mentioned in section 155 the *terminus a quo* and the *terminus ad quem* of the unlicensed boat must both be within the prescribed area.

Apart from the Municipal Act, the owner of a right of ferry might have rights which would be in some respects possibly wider and in others possibly narrower than those which the Act confers upon a Municipality.

Appeal by the Plaintiffs.

Suit for injunction.

The material facts are stated in the judgment of N. Chatterjea, J.

Mr. Jackson and *Babu Khitis Chunder Sen* for the Appellants.

Sir S. P. Sinha and *Babu Probodh Kumar Das* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

June, 29.

N. Chatterjea, J.—This appeal arises out of a suit for an injunction under the following circumstances.

There is a Municipal ferry known as the Anti-mahomed Pathuria-ghat ferry on the Karnafuli river in the town of Chittagong. The ferry was let out by the Chittagong Municipality (the defendant No. 1) to certain farmers who are the other defendants in the suit. The plaintiffs who are boatmen allege that they and other boatmen and Sampanwallas have been from a long time ferrying passengers in their boats between the Anti-mahomed and Chaklai ghats on the river Karnafuli and the Kalapole and Jinnat Ali's pole ghats on the Sikalbaha canal, which is connected with, and at right angles to, the Karnafuli river, and as the said ghats on the Sikalbaha canal are not within a distance of 2 miles along the banks of the river Karnafuli above or below the Municipal ferry, they are entitled to ferry boats. They further allege that after a criminal case in connection with the ferry had been decided by the High Court, the District Magistrate of Chittagong issued an order upon the Anti-mahomed ghat ferry-holder prohibiting the levy of tolls on boats coming through Sikalbaha or Boalkhali, but that notwithstanding such order the Municipality and the Ijaradars have been constantly harassing the boatmen and Sampanwallas including the plaintiff by bringing criminal cases against them. The plaintiffs

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therefore brought the present suit for an injunction restraining the defendants from opposing or obstructing the plaintiffs, and other boatmen and sampanwallas in carrying passengers to and from the town of Chittagong through the Sikalbaha canal or levying tolls from them.

The defence shortly stated was that Kalapole and Jinnat Ali's pole on the Sikalbaha canal are within two miles of the Municipal ferry station, that the Sikalbaha canal is a part of the river Karnafuli, and that the Municipal Commissioners have every right to prosecute people who infringe the ferry laws by carrying passengers within the ferry limits either within the Sikalbaha canal or alongside the banks of the river Karnafuli.

The Court of first instance decreed the suit, but that decree was reversed on appeal by the Court of Appeal below, and the plaintiffs have appealed to this Court.

The decision of the question involved in the case turns upon the construction of section 155 of the Bengal Municipal Act (Act III of 1884). That section runs as follows :—

"No person shall keep a ferry-boat for the purpose of plying for hire within a distance of two miles above or below any Municipal ferry without the previous sanction of the Commissioners if he plies within the Municipality, of the Magistrate of the District if without such limits, or of the Magistrate of the District and the Commissioners, if one of the two banks between which he plies is within, and the other bank is without such limits.

This section shall not apply to any private ferry which may be in existence at the commencement of this Act."

It is contended on behalf of the appellants that the words "within a distance of two miles above or below the ferry" mean within a distance of two miles above or below the ferry along the banks of the river. On the other hand it is contended on behalf of the respondents that the words mean within a radius of two miles of the Municipal ferry, and this is the construction which has been placed on the section by the learned District Judge.

I am of opinion that the words "above or below the ferry" mean above or below the ferry along the banks of the river. That the words "above or below" have reference to the banks of the river or stream appears from the fourth paragraph of the section which refers to sanction of the Magistrate and the Commissioners if one of the two banks between which a private ferryman plies, is within and the other bank is without such limits. If it was intended to fix the limits of a Municipal ferry to any point within a distance

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of two miles in any direction of the ferry station, I do not see the use of the words 'above or below the ferry.' The Legislature could have clearly expressed such intention by saying from "any point within a distance of two miles," as it has done in the Bengal Ferries Act I of 1885, section 16 of which runs as follows:—"No person shall except with the sanction of the Magistrate of the District, maintain a ferry to or from any point within a distance of two miles from the limits of a public ferry."

The learned District Judge holds "Thus the jurisdiction of a public ferry extends to a radius of 2 miles from the ferry station. Municipal ferries are simply public ferries administered by the municipality and surely when they are made over to the municipality their jurisdiction does not thereby become more restricted. I think, therefore, that the provisions of the Municipal Act referring to them should be read in the light of the corresponding provisions of the Public Ferries Act."

Section 155 of the Bengal Municipal Act, however cannot be construed in the light of the provisions of the Public Ferries Act (Act I of 1885). Section 4 of Act I of 1885 (which is a later Act) lays down that nothing in that Act contained shall apply to any ferry deemed or declared to be a municipal ferry under the provisions of the Bengal Municipal Act 1884."

The provisions of section 4 of the Act appear to have been lost sight of by the learned District Judge.

Section 2 of Act I of 1866 which related to Public Ferries, and was repealed by Act I of 1885 contained the words "within a distance of two miles above or below the ferry."

The ferry on the Karnafuli river was a public ferry, and was made over by the Government to the Municipality in the year 1863. Section 148 of Act III of 1884 provides that the Local Government may with the consent of the Commissioners make over to them any existing public ferry within or adjacent to the limits of the Municipality to be administered by them until the Local Government shall otherwise direct, and that every ferry while so administered shall be deemed to be a Municipal ferry. It is urged on behalf of the respondents that the words used in defining the limits of a public ferry under Act I of 1866, and the limits of a Municipal ferry under Act III of 1884 were used in the same sense as those in section 16 of Act I of 1885. But the limits of a public ferry under section 2 of Act I of 1866 extended, and those of a Municipal ferry under Act III of 1884 extend only to a distance of 2 miles 'above or below the ferry', and those Acts cannot, as stated above, be

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construed with reference to a later Act by which the limits of a public ferry were extended to "any point within a distance of two miles," and when the later Act expressly provides that nothing in that Act shall apply to any ferry deemed or declared to be a Municipal ferry under the provisions of the Bengal Municipal Act 1884. The provisions of Act I of 1885 show that the Legislature did not intend to alter the limits of a Municipal ferry which extend only to two miles above or below the ferry *i e*, along the banks of the river or stream on which there is a Municipal ferry.

The case of *The Government of Bengal* v. *Senayat Ali* (1), upon which reliance is placed on behalf of the appellants does not decide the point under consideration. But after deciding the actual point which arose for decision in that case, the learned Judges proceeded to observe, "A 'ferry' as we understand the meaning of that expression in the Bengal Municipal Act means the exclusive right to carry passengers across the stream from one bank to the other on payment of certain prescribed tolls, and the object of section 155 appears to us to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license within the prescribed limits." These observations were unnecessary for the decision of the case, but they support the view I have taken.

The defendants in their written statement stated that the Sikalbaha canal is a part of the Karnafuli river. But the Munsiff points out that "no attempt was made by the defendants to make out that the Sikalbaha canal is a part of the river Karnafuli itself and that therefore the bank of the Sikalbaha canal should be regarded as the bank of the Karnafuli itself."

The distance between the Kalapole bridge and the place where the Sikalbaha canal meets the Karnafuli is nearly three quarters of a mile, but the distances between the Kalapole and Jinnat Ali ghats on the Sikalbaha canal and the Municipal ferry-stations on the Karnafuli river have not been found. The learned pleaders here stated with reference to the map on the record that the distance of one of the ghats on the canal and one of the Municipal ferry-stations by the river route is more than two miles, but that the distance between the other ghats is less than two miles. In the view I take of the case, however, an enquiry into the distance is unnecessary.

The learned District Judge says—"Now if the section 155 be taken to refer strictly only to the actual banks of the river, boatmen could ply between a place one yard down to the Sikalbaha canal

(1) (1900) I. L. R. 27 Calc. 317.

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and Anti mahomed ghat without restriction, whereas if they started at a place several miles up the Karnafuli river they would have to get permission of the Commissioners. This seems to me to be an absurd construction of section 155 of the Municipal Act and it seems quite clear that the Legislature cannot have intended that it should be so interpreted." But if, as I think, the words used in the section are plain and construed in their ordinary sense mean that the limits of a Municipal ferry extend to two miles 'above or below' the ferry along the banks of the river—(up-stream or down-stream) the Court cannot construe the section in a different way merely because the construction of the words in their ordinary sense may, in some cases, lead to results which might seem anomalous. As pointed out by Jervis C. J. in *Abley* v. *Dale* (1). "If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." It must also be borne in mind that section 156 imposes a penalty for breach of the provisions of section 155. It says, "whoever keeps a ferry boat, contrary to the provisions of the last preceding section shall be liable to a fine not exceeding fifty rupees and to a further fine, not exceeding ten rupees for each day during which the offence is continued after he has been required by a notice in writing to desist from such offence."

It is unnecessary however to consider, in the present case, whether the hypothetical case put by the learned Judge would constitute a substantial infringement of the statute, as the ghats on the Sikalbaha canal are at some distance from the junction of the canal with the river.

I am of opinion that the words used in the section do not mean "within a radius of two miles of the ferry" as held by the Court of appeal below.

The learned District Judge holds that one of the banks between which plaintiffs ply being within Municipal limits, they would, in any case, require the permission of the District Magistrate and of the Commissioners. But the banks referred to in the last clause of section 155 of Act III of 1884, are banks of the same river, and

(1) (1851) 11 C. B. 378 (391).

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the clause applies only to cases where one of the two banks of the same river is within and the other without the limits of the Municipality.

The learned Judge is of opinion that the "injunction prayed for seems to be unnecessary as it has not been proved that the ferry farmer is at present obstructing the passage of their boats or levying tolls on the plaintiffs and should he do so, he would be liable to prosecution under the provisions of the Indian Penal Code." But the Court of first instance finds that "the evidence adduced by both the parties shows that many sampanwallas including several of the plaintiffs were at the instance of Chittagong Municipality prosecuted for plying boats for hire between Kalapole and Chittagong town." The Municipality in their written statement deny the right of the plaintiffs and state that they rightly prosecuted the "people including some of the plaintiffs who infringed the ferry laws and committed offences against the same and often got convictions."

Under the circumstances, I think an injunction should be granted. The decree of the Court of appeal below is accordingly set aside and that of the Court of first instance restored with costs here and the Court below.

Richardson, J.—I have no hesitation in accepting the meaning attributed by the appellants to the words "above" and "below" which occur in section 155 of the Bengal Municipal Act. These words as applied to a place upon a river (the ferry in question is on a river) imply a relation up-stream or down-stream between that place taken as the starting point and other places on the same river. It is impossible to use the words intelligibly or consistently with reference to places on other rivers or streams or khals whether or not they flow into the river first spoken of. If the words can be used at all in connection with a piece of water, such as a lake which is not a river, they could only mean places above and below the same piece of water, though it might be more difficult to say what places were above and what were below. For the present purpose we need only consider river ferries.

In Act I (B. C.) of 1866, relating to public ferries, what may be called the area of protection was defined in the same terms as those used in the Bengal Municipal Act. Act I (B. C.) of 1866 was repealed by the Bengal Ferries Act [Act I (B. C) of 1885]. Section 16 of the latter act lays down that "no person shall except with the sanction of the Magistrate of the District, maintain a ferry to or from any point within distance of two miles from the limits of a

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public ferry." Two provisos are added. Under the first the Local Government is empowered in specified cases to reduce or increase, the two mile distance. The second enacts that "nothing hereinbefore contained shall prevent persons keeping boats to ply between two places, one of which is without, and one within, the said limits, when the distance between such places is not less than three miles or shall apply to boats which the Magistrate of the District expressly exempts from the operation of this section."

Now, the frame of that section is entirely different from the frame of the corresponding section in the Act of 1866 and in the Municipal Act. In the first place the area of protection was clearly extended. Instead of a distance of two miles above or below the protected ferry, we have a distance or radius, of two miles from its limits and no unlicensed ferry is to be maintained "to or from any point" within such distance. The stringency of the words "to and from any point" is qualified by the second proviso, so that an express rule is laid down on a question on which the other two acts are silent, namely, to what extent the entry of a ferry boat into the area of protection from outside is to be regarded as an invasion of the protected ferry. The question arises in the present case but before dealing with it we may dispose of another question which admits of an easy answer.

We were asked on behalf of the respondent Municipality to adopt the view of the District Judge that section 155 of the Bengal Municipal Act should be interpreted in the light of section 16 of the Act of 1885. The argument was that as the Legislature could not have intended by the latter section to enlarge the limits within which protection was previously afforded to public ferries, therefore the language used in the Act of 1866 and in the Municipal Act must mean the same thing as the language used in the Act of 1885. If such reasoning could be employed, it would seem more appropriate to apply it conversely and to interpret the Act of 1885 in conformity with the Act of 1866. But the limits defined in the Act of 1885 are not identical with the limits defined in the earlier Act which it repealed and no construction can make them identical. The Act of 1885 therefore can afford no assistance in the interpretation of section 155 of the Municipal Act.

Moreover section 4 of the Act of 1885 declares that "nothing in that Act contained shall apply to any ferry deemed or declared to be a Municipal ferry under the provisions of the Bengal Municipal Act of 1884." The Legislature did not overlook the existence of Municipal ferries (which it had dealt with in the previous year) but

expressly left them untouched and the law relating to them unaltered. The learned District Judge in the Court of appeal below must have overlooked that section when he substituted the language used in the Act of 1885 for that used in the Municipal Act.

An elementary canon of construction forbids us from straining the language of the Municipal Act for the purpose of depriving people like the plaintiffs of any rights to which they would otherwise be entitled. In the present case what we are asked to do is not merely to strain the language but to change it into something totally different. To do so would contravene all rules and precedent.

We must confine ourselves therefore to the Municipal Act, on which alone the rights of the parties depend. That Act prohibits an unlicensed ferry-boat from plying for hire within a distance of two miles above or below a Municipal ferry. The only question which remains is as to the protection, if any, this prohibition affords against boats entering the area of protection from outside, either from beyond the two mile limits on the river or by way of a tributary or *khal* which joins the river within the two mile limit. The word ferry in the expression "Municipal ferry" must denote a place. It is the place where passengers are conveyed by boat from one side of a river to the other. A right of ferry is the right so to convey passengers at such a place. A ferry boat, however, as the term is used, must mean any boat used for the purpose of carrying passengers across the river whether at that place or some other place. Rivers in this country are often large. It is not easy to give a defined limit to the term "ferry boat" and it is unnecessary in the present case to attempt a definition. The parties unite in decribing the appellants' boats as ferry boats. Is it then an invasion of a Municipal right of ferry created by the Act for an unlicensed ferry boat to pick up passengers at some place outside the prescribed area of two miles above and below the ferry and without touching at the nearer bank to take them across the river to a point on the further bank within that area or to do the converse ? In my opinion so extended a protection was not contemplated by the Act. To come within the prohibition the *terminus á quo* and the *terminus ad quem* of the unlicensed boat must both be within the prescribed area. This is a construction which does no violence to the language used and it is the most reasonable construction. Otherwise there would be no limit to the protection afforded. The prohibition would extend to ferry boats starting at any distance however great from the Municipal ferry. It would cover a journey between two places both outside the

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prescribed area provided the river was crossed within or partly within and partly without, that area.

The view indicated receives support from the opinion expressed in *The Government of Bengal* v. *Senayat Ali* (1), though that expression of opinion was not necessary to the decision of the case.

We may add, that we have not to consider what apart from the Act would amount to an invasion of an established right of ferry created and defined by the Act. Apart from the Act the owner of a right of ferry might have rights which would be in some respects possibly wider and in others possibly narrower than those which the Act confers upon a Municipality. The question in such a case would be what in the circumstances are the reasonable limits of the right enjoyed: *Hamerton* v. *Dysart* (1).

The learned District Judge considers it absurd to suppose that while a Municipal ferry is protected for two miles above or below it, no protection is afforded against a ferry boat starting a few yards up a khal. It is possible that such a device might be regarded as a merely colourable evasion of the act and therefore substantially an infringement of the Municipal right of ferry. But no such point arises here. The appellant's boats start from two places on the Sikalbaha khal at some distance from its junction with the river within the two miles above the Municipal ferry. They make continuous journeys between those places and their terminus on the other side of the river. It is not suggested that they pick up passengers at the mouth of the khal and it is not established that the appellant's conduct of this traffic is a merely colourable evasion of the Act.

I agree that the appeal should be allowed.

A. T. M. *Appeal allowed.*

(1) (1900) I. L. R. 27 Calc. 317. (1) (1916) A. C. 57.

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Civil Procedure Code—(*Contd.*).

Cross-examination—*Splitting up.*

The cross-examination of witnesses should not be broken up into several detached portions. Such a practice exposes witnesses to the risk of being tampered with and provides the fabrication of false evidence. **Mirza Sadik Husain Khan v. Nawab Saiyed Hashim Ali Khan** ... 363

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Limitation—(*Contd.*).

The term "dispossession" in article 142 of schedule II of the Indian Limitation Act, is not defined in the Act, but its meaning is well-known. A man may cease to use his land because he cannot use it, as when it is under water. He does not thereby discontinue his possession: constructively it continues, until he is dispossessed; and upon cessation of of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment." It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to distinguish the old title and start a new one, the owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

"To defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it," and therefore it is necessary to look at the position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor. An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts which *prima facie* are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object.

A chur which was held to be a reformation *in situ* of plaintiff's land, began to appear in 1888 as an island chur, which was considered as an accretion to a Government estate, but was unfit for assessment till 1890. It was not regularly surveyed till 1894, but, beginning in the year 1891-1892 it was under direct management of the Government on the *utbandi* system on yearly settlement. In 1894 a small portion of the area of the chur was under cultivation and the residue was uncultivated jungle. The whole of it was every year completely under water from June to October. The chur remained in the possession of the Government until 1902, when the Government allowed the defendants' claim that the chur was reformation *in situ* of lands belonging to them and delivered the possession thereof to them. In September, 1904, the plaintiffs sued to recover possession but the defendants pleaded limitation and to make out their case claimed to tack on to their period of possession the period of Government's possession:

Held, that on the evidence whether the land cultivated was the same each year or not did not appear; at any rate, it was annually submerged, and there were no circumstances to link together various portions of ground, so as to make the possession of a part, as it emerged, amount con-

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Mortgage—(Contd.).

making the whole village liable for each debt. The mortgagee obtained the usual mortgage decree against the widow and P. S , both of whom appealed. But on the death of P. S. his appeal was abandoned by his heirs, the respondents, and the suit against the widow was dismissed by the High Court This decision was upheld by the Judicial Committee before whom on the death of the widow the respondents were brought on record as the heirs of J. C. The mortgagee's decree was executed only as against the share of P. S The mortgagee brought the present suit to enforce the mortgage of 1876 :

Held, that though the mortgagee's intention at the time of the execution of the deeds of 1887 was to accept a new security in lieu (*inter alia*) of the security of 1876, yet his original intention was entirely frustrated by the fact that the two deeds of 1887 were held not binding on the widow, and it was not consistent with equity and good conscience that the respondents, having successfully maintained that the mortgages of 1887 were not binding on the widow and consequently on them as the heirs of J. C. should now be permitted to claim the benefit of the transaction of 1887 as a release of the mortgage of 1876 ; and that nothing had happened to preclude the mortgagee from enforcing the mortgage of 1876 against the respondents.

Section 41 of the Indian Contract Act, which provides for the discharge of a contract by the acceptance of performance by a third party, applies only where the contract has in fact been performed. **Har Chandi Lal v. Sheoraj Singh** 316

——— *Usufructuary mortgage deed—Construction—Personal liability of mortgagor—Loan—Wrongful acts of the mortgagor—Transfer of Property Act (Act IV of 1882) Sec. 68.*

In considering the question whether a usufructuary mortgagor is personally liable for payment of that portion of the loan and interest which remained unsatisfied out of the usufruct of the mortgaged property, it must be borne in mind (1) that a loan *prima facie* involves such a personal liability (2) that such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest : but (3) that the nature and terms of such security may negative any personal liability on the part of the borrower : and (4) that even if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (b) or (c) of the Transfer of Property Act.

The plaintiffs were put in possession of certain villages under a usufructuary mortgage deed providing for the repayment of a loan with interest. On the expiry of the term of the mortgage they gave up possession. Thereafter they sued alleging *inter alia* that owing to wrongful acts of the mortgagor they had failed to realize a large part of their debt, and claiming a mortgage decree for the balance or alternatively a simple money decree.

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The proviso to section 111 A of the Bengal Tenancy Act applies only to a case where the record of rights has been framed in pursuance of an order made under section 101 sub-section (2) cl. (d), that is, to a case where a settlement of land revenue is being or is about to be made, and not to a case where the record of rights was prepared at the instance of a landlord under the provisions of section 101 sub-section (2) cl. (a).

Section 109 of the Bengal Tenancy Act is no bar to a suit for a declaration that the proceedings under Chap X were vitiated by fraud.

Section 105 authorises the settlement officer, in the course of proceedings under section 105 for the settlement of fair and equitable rent, to investigate questions which would otherwise be determined at the instance of the aggrieved party in a suit instituted under section 106. But where the matters in controversy in the suit did not form the subject of investigation under section 105, the suit is not barred under section 109.

The jurisdiction of a Civil Court is not constructively excluded when a point has neither been raised nor decided under section 105 read with section 105 A.

To attract the application of section 109, it is essential that the Civil suit has for its subject a matter which has already formed the subject of an application under section 105.

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Vakil's right of audience—*Legal Practitioners Act (XVIII of 1879), Sec. 4—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), Sec. 195 (6) and (7) (c)—Revision—Civil Procedure Code (Act V of 1908), Sec. 115—Presidency Small Cause Court's order refusing sanction—Original Side of the High Court, powers of —Practice of the Court.*

The applicant applied to the Court of Small Causes, Calcutta, for sanction to prosecute the opposite party under sections 209 and 193 of the Indian Penal Code. The sanction having been refused, an application was made to the original side of the High Court under the provisions of section 115 of the Civil Procedure Code and of section 195 (6) read with section 195 (7) (c) of the Code of Criminal Procedure and the Chief Justice constituted two of the Judges of the High Court to hear the application :

Held (Chaudhuri J. dissenting) that a vakil enrolled and ordinarily practising in the High Court was entitled to be heard on behalf of the opposite party. The order sought to be set side was one made by a Civil Court, and the constituted Bench was sitting as a Divisional Bench in the exercise of the civil and not of the criminal jurisdiction of the High Court. The Divisional Bench so constituted was a superior Court exercising not original but appellate or revisional jurisdiction.

Per Chaudhuri J: The constituted Bench sat as the principal Court of original jurisdiction situate in Calcutta, to hear the application, exercising such jurisdiction as is ordinarily exercised on that side, and not in the exercise of the criminal jurisdiction of the High Court.

The Presidency Small Cause Court was subordinate to the Original Side of the High Court.

The Original Side of the High Court could exercise revisional power over the Presidency Small Cause Court, and no special Bench was necessary to be constituted for the purpose.

The Original Side of the High Court is not a Court subordinate to the appellate Bench of the same Court which hears appeals therefrom and an application by way of appeal to it under section 195 of the Code of Criminal Procedure is not competent.

The power of superintendence, direction and control which was possessed by the Supreme Court over the Presidency Small Cause Court, appertains to the original side of the High Court. All such powers when exercised by the original side, are exercised in its original jurisdiction within the meaning of section 4 of the Legal Practitioners Act. The appellate jurisdiction of the Divisional Benches of the High Court is not

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